(5)

No. 93-1911

In The

Supreme Court of the United States

October Term, 1994

CINDA SANDIN, *Unit Team Manager, Halawa Correctional Facility,*

Petitioner,

vs.

DeMONT R.D. CONNER, *et al.,*

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
KATHLEEN M. SATO
Deputy Attorneys General
State of Hawaii
**Counsel of Record*

Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Petitioner Cinda Sandin, Unit Team Manager, Halawa Correctional Facility

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

60 pp

QUESTION PRESENTED

Whether a maximum security state prison inmate who is not subject to a loss of good time credit, nor to any necessary impact on parole, but who "may be" subjected to disciplinary segregation for violation of prison rules, has a "liberty interest" in avoiding disciplinary segregation solely because state prison disciplinary rules require a disciplinary committee to find "substantial evidence" of a rule infraction before deciding whether and to what extent to order the inmate segregated?

PARTIES TO THE PROCEEDING

Petitioner Cinda Sandin was, at the times relevant to this proceeding, a Unit Team Manager at Halawa Correctional Facility, Department of Corrections, State of Hawaii. She appears in this Court in her official and individual capacities. Petitioner was one of sixteen state prison officials sued by Respondent DeMont R.D. Conner in the amended complaint in the District Court in Civil No. 88-0169 (D. Haw. am. comp. filed Sept. 8, 1989) (J.A. 169-90). She is the only official left in the litigation with respect to Respondent Conner's procedural due process claim in connection with an August 28, 1987, disciplinary hearing, Pet. App. A8-A9, and Ms. Sandin is the only Petitioner.

Respondents include DeMont R.D. Conner, who at all times was and is serving a thirty-years-to-life prison sentence in the Hawaii state penal system, formerly administered by the Department of Corrections, and which is now administered by the Department of Public Safety, State of Hawaii. *See* Haw. Rev. Stat. §§ 353-1 *et seq.* (1985 & Supp. 1992). Other respondents are Theodore Sakai, acting Administrator, Department of Corrections; Harold Falk, Director of Corrections, and various employees of Halawa Correctional Facility, *i.e.*, Lawrence Shohet, Corrections Supervisor; William Oku, Administrator; Leonard Gonsalves, Chief of Security; Francis Sequeira, Unit Team Manager; and Adult Corrections Officers William Summers, Robert Johnson, Gordon Furtado, Abraham Lota, Edward Marshall, William Paaga, and Brian Lee. Also named as Defendant below, and as a

PARTIES TO THE PROCEEDING – Continued

Respondent here, is Dr. Kim Thorburn, a medical officer with responsibility for Halawa facility. Also a Defendant below and a Respondent here is the State of Hawaii. The State and each of the officer respondents have an interest in the outcome of (and support) Ms. Sandin's petition and brief, and are named as nominal respondents only pursuant to S. Ct. R. 12.4. All of the officer respondents are named, as below, in their official and in their individual capacities.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 93-1911

In The

Supreme Court of the United States

October Term, 1994

CINDA SANDIN, *Unit Team Manager, Halawa Correctional Facility,*

Petitioner,

vs.

DeMONT R.D. CONNER, *et al.,*

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, entered February 2, 1994, is reported at 15 F.3d 1463 (9th Cir. 1994), and is reprinted in Appendix ("Pet. App.") "A" to the Petition for Certiorari. The initial opinion of the Court of Appeals, entered June 2, 1993, is reported at 994 F.2d 1408 (9th Cir. 1993). The order and judgment of the District Court from which appeal was taken by Respondent Conner are unreported and are printed at Pet. App. "C" and "D." The report and recommendation of the Magistrate Judge, to

whom Petitioner's motion for summary judgment originally was referred, is reprinted in the Joint Appendix ("J.A.") at 325.

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit was entered June 2, 1993, *see* Pet. App. A1, and a timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was filed June 16, 1993. *See* Joint Appendix ("J.A.") 18. On February 2, 1994, the Ninth Circuit issued an amended opinion, but did not dispose of the petition for rehearing. *Id.* On February 25, 1994, the Court of Appeals denied the petition for rehearing and rejected the suggestion for *en banc* review. Pet. App. "E." The time in which the Petition for Certiorari was required to be filed extended to and included May 26, 1994, and the Petition was timely filed by mail on that day under this Court's Rule 29. Jurisdiction is invoked here pursuant to 28 U.S.C. § 1254(1).

Jurisdiction in the United States District Court for the District of Hawaii was alleged to have been conferred by 28 U.S.C. § 1343(3). Jurisdiction to review the final judgment entered in the District Court in favor of all Defendants lay in the United States Court of Appeals pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL, STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in relevant part that:

> [No State shall] deprive any person of life, liberty, or property, without due process of law.

Chapter 201, Title 17, of the Hawaii Administrative Rules, subchapter 2 of which governed the adjustment process at Halawa Correctional Facility at all times relevant to this litigation, and which continues in force, has been printed in its entirety in the appendix to this Brief ("Br. App."), as have been parts of Chapter 353, Haw. Rev. Stat., as amended, and Hawaii Administrative Rules bearing upon the powers of the Department of Public Safety, as well as those of the Hawaii Paroling Authority regarding the granting of parole to Hawaii prisoners.

The Halawa Correctional Facility Special Needs Facility Maximum Custody Inmate Guidelines ("Max I"), which became effective on June 16, 1994, after the Petition for Certiorari was filed in this case, are reprinted, *infra*, Br. App. 48a-71a.

STATEMENT OF THE CASE

A. Introduction.

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), this Court held that a prison's rules that permitted, but did not mandate, denial of visitation privileges under certain circumstances did not create a "liberty interest" in receiving visitors. *Id.* at 464. In response

to the request of thirty-one States' Attorneys General, the Court found it was unnecessary to create a "bright line" rule "that prison regulations, regardless of the mandatory character of their language, or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " *Id.* at 461 n.3. "Inasmuch as a 'bright line' of this kind [was] not necessary for a ruling in favor of petitioners," the Court "refrain[ed] from considering it at this time," "express[ing] no view on the proposal and leav[ing] its resolution for another day." *Id.* at 462 n.3.

This case concerns not merely the due process implications of visitation with those *outside* the prison, who are presumed innocent, but the ability of prison officials to segregate inmates within the prison for violation of disciplinary rules. Here, where the need to be free of intrusive federal review is at its height, the Ninth Circuit has held that Hawaii prison rules create a "liberty interest" in avoiding "disciplinary segregation" without more. Hawaii does not grant "good time" credits, and even the most serious disciplinary finding has no necessary impact upon parole. The main issue here is whether Hawaii's prison rules, which authorize, but do not require, the imposition of disciplinary segregation, create a federally protected "liberty interest" under the Due Process Clause solely because those regulations require, as a matter of state law, "substantial evidence" of misconduct before a disciplinary committee is mandated to consider whether to order the inmate to be segregated on the basis of his or her alleged misconduct.

B. Background of the Litigation.

1. The Role of Segregated Housing in Hawaii's Halawa Correctional Facility.

Like other States and the federal Government, the Fiftieth State has created a multi-tiered system of penal institutions. *See* Haw. Rev. Stat. §§ 353-6, -7, -8 (Supp. 1992). This system, consisting of conditional release centers, community correctional centers, and a high security correctional facility, *id.*, seeks to achieve the penal law's dual goals of retribution and rehabilitation, cognizant of "the 'ever-present potential for violent confrontation and conflagration' " that is present in any penal system,[1] and the State's duty to " 'take reasonable measures to guarantee the safety of the inmates.' "[2]

Halawa Correctional Facility ("Halawa" or "HCF"), located in central Oahu, is the only maximum security correctional facility in the Hawaii penal system. By law, Halawa is charged with providing "extensive control and correctional programs for categories of persons who cannot be held or treated in other correctional facilities," including "[i]ndividuals committed because of serious predatory or violent crimes against the person"; "intractable recidivists"; "[p]ersons characterized by varying degrees of personality disorders"; "[r]ecidivists identified with organized crime"; and "[v]iolent and dangerously deviant persons." Haw. Rev. Stat. § 353-7(b)(1) (1985 &

---

[1] *Whitley v. Albers*, 475 U.S. 312, 321 (1986) (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977)).

[2] *Farmer v. Brennan*, 114 S. Ct. 1970, 1976 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).

Supp. 1992). Because of Halawa's function, even inmates in "general population" at HCF are isolated in their cells for significant periods each day. In the period at issue in this case,[3] for example, those inmates in the least-restrictive category at the facility were in "lockdown" from 2

[3] The precise structure of inmate privileges in general population, protective custody, administrative segregation, and disciplinary segregation, that obtains at the present time at HCF is not reflected by the record, in that the "Segregation and Maximum Control Program" ("SMCP"), *see* Exhs. "36," "60," and "61," Clerk's Record ("CR") 58, J.A. 125-90, is no longer in effect at Halawa. The Department of Public Safety, however, has not foresworn its discretion to re-employ the SMCP in the future, and for this reason, the issues raised by that program, and, specifically, the contention that the assignment of non-disciplinary segregation inmates to virtually the same conditions of confinement, destroys any "liberty interest" that inmates may have in avoiding "disciplinary segregation," even if disciplinary segregation may be ordered by the prison adjustment committee only upon a finding of "substantial evidence" of misconduct, *infra* pp. 45-47, is not moot. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). In any case, this sub-issue is not moot because HCF maintains classification categories, *i.e.*, "Maximum Custody I," in which inmate privileges are as severely limited as those under "Phase I" of the SMCP. *Cf. Schall v. Martin*, 467 U.S. 253, 256 n.2 (1984), and Br. App. 48a-71a. The procedures and regulations concerning inmate classification, *see* Haw. Admin. R. § 17-201-1, moreover, remain the same. In addition, inmate prerogatives under the SMCP "Phase I" classification are of continued relevance to the instant case, in that the Ninth Circuit's judgment reopens Respondent's claim for damages. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 n.6 (1983). Indeed, even equitable relief pertaining to the SMCP remains an issue in that a finding that respondent's Due Process rights were violated could give rise to claims for prospective relief expunging the misconduct finding at issue in this case, which was made in August, 1987.

pm to dinnertime, and from 10 pm to breakfast, and were subject to numerous restrictions when allowed out of their cells. J.A. 125-41. Those in the next restrictive category – inmates assigned to "Module 'A' " – were locked down from 2 pm to 6 pm, and from 10 pm to 10 am. J.A. 126. The next most restrictive category – known at the time as "P...se I" – included inmates housed in the Special Holding Unit ("SHU"), which consisted of single-man cells. J.A. 142-55. The Special Holding Unit also housed inmates in categories known as "Protective Custody," *see* Haw. Admin. R. § 17-201-23, "Administrative Segregation," *see id.* § 17-201-22, and "Disciplinary Segregation," *see id.* § 17-201-19(c).[4]

Conditions in the Special Holding Unit were admittedly "virtually" "one and the same" for inmates confined either to "Phase I" or "disciplinary segregation," Resp. Aff. ¶ 18 (CR 49), J.A. 84. The only significant difference in privileges between inmates in "Phase I" and "Disciplinary Segregation" was that the latter could generally receive one less non-legal telephone call and one less family visit per month period. *See id.; see also* CR 58, Exhs. "60," "61," J.A. 142-55, 156-68.[5]

[4] *See* CR 27 (mem. at 3 n.2), J.A. 58 n.2 (admitting "[t]he special holding unit houses inmates on disciplinary[,] phase one, administrative segregation, and protective custody."). "Phase I" is analogous presently to a classification category known as "Maximum Custody I." *See* Br. App. 48a-71a.

[5] The process for assigning inmates to disciplinary segregation, therefore, was (and remains) only one of the procedures for "regulating the internal management of Hawaii correctional facilities." Haw. Admin. R. § 17-200-3, Br. App. 2a. Moreover, placement of Halawa inmates in the SHU, under circumstances virtually identical to those suffered by those

Indeed, all inmates in the Special Holding Unit were subject to numerous restrictions. All were subjected to lock-down except for one sixty-minute exercise period, five times per week, J.A. 152, 166, one ten minute shower, five times per week, J.A. 152, 166, law library, J.A. 142, 156, official (legal) and permitted family visits, J.A. 149-50, 163-64, court proceedings, and medical and religious needs that could not be met in the Unit. *See* J.A. 142-43, 156-57, 300-16. Only one Unit inmate at a time was allowed out of his cell, *see* J.A. 142, 156, and all Special Holding Unit inmates were not only subjected to strip-searches upon their departure and return from the unit, *see* J.A. 143, 157, but required to wear leg irons and waist chains at all times while out of their cells, *see* J.A. 143, 157. Televisions, radios, tape recorders, and other electronic entertainment devices were banned, *see* J.A.

---

ordered to disciplinary segregation, as a matter of general classification procedures, administrative segregation, or protective custody, has at all times been unquestionably discretionary. Hawaii's classification rule, Haw. Admin. R. § 17-201-2, Br. App. 29a, for example, has remained virtually the same since this Court decided in *Olim v. Wakinekona*, 461 U.S. 238 (1983), that application of the then-existing classification rule (*see* Exh. "F" to CR 83, J.A. 243-48), to effect an inter-state transfer did not implicate a "liberty interest." 461 U.S. at 248-51. Likewise, Hawaii's administrative segregation rules permit segregation "[w]henever the facility administrator or a designated representative" "determines that there is reasonable cause to believe that the inmate or ward is a threat to" "[l]ife or limb," "[t]he security or good government of the facility," or "[t]he community," or "[w]henever any similarly justifiable reasons exist." Haw. Admin. R. § 17-201-22(2), (3), Br. App. 25a; *cf. Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983). Protective custody can be ordered whenever "there is reason to believe that such action is necessary[.]" Haw. Admin. R. § 17-201-23(a), Br. App. 25a-26a.

144, 158, and inmates were subjected to numerous restrictions on possession of other materials, *id.* at 145-49, 159-62. Inmates relocated to the SHU typically were not permitted to attend otherwise scheduled programs, due to the special security concerns in the Unit. *See* J.A. 306. *Cf.* HCF Maximum Custody Inmate Guidelines, Br. App. 48a-71a.

2. The Hawaii Penal System's Internal Disciplinary Process.

At the time relevant here, and continuing today, Halawa facility inmates have been governed by a disciplinary system that consists of Hawaii's general criminal laws and an "adjustment process" administered by the prison itself. *See infra* Br. App. 4a-24a. The "main purpose" of the latter process, as the Hawaii Supreme Court has held, is "summarily maintaining prison order." *State v. Alvey*, 67 Haw. 49, 55, 678 P.2d 5, 9 (1984).

a. The Adjustment Process and Its Lack of Impact on an Inmate's Term of Confinement.

Under the "adjustment process," prison administrators have defined a variety of "prohibited acts," categorizing them as to their severity. "Misconduct" is categorized as "greatest misconduct," "high misconduct," "moderate misconduct," "low moderate misconduct," and "minor misconduct." Br. App. 7a, 8a, 10a, 13a, 14a. The maximum punishment for the most serious misconduct is "[d]isciplinary segregation up to sixty days," or "[a]ny other sanction other than disciplinary segregation." Haw. Admin. R. § 17-201-6(b), Br. App. 8a. The

"other sanctions" to which the administrative rule refers include loss of privileges, such as access to non-legal mail or the commissary, but do not include any sanction that lengthens an inmate's term of incarceration. Hawaii does not employ any system of "good time" credits, and the Hawaii State Paroling Authority is free to ignore a record of misconduct in granting parole. *See* Haw. Rev. Stat. §§ 353-68, 353-69 (1985). Parole may be granted "at any time after the prisoner has served the minimum term of imprisonment fixed according to law," *id.* § 353-68, and so long as "it appears to the Hawaii paroling authority that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that the prisoner's release is not incompatible with the welfare and safety of society," *id.* at § 353-69. Accordingly, while "[p]arole may be denied to an inmate when the Authority finds" "[t]he inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record," *see* Haw. Admin. R. § 23-700-33(b), Br. App. 44a, the Authority is never bound to deny parole on the basis of such a finding. Likewise, the Paroling Authority is not bound to grant parole upon finding that the inmate has *not* been "a management or security problem in prison," or even upon a finding that all other factors, on which a denial of parole may be predicated, are absent. *Cf. Board of Pardons v. Allen*, 482 U.S. 369, 374 (1986) (contrary statute).

b. The Discretion to "Convict" Under the Adjustment Process.

In the event an inmate is accused of a "serious rule violation," which includes any accused violation that

carries with it a possible penalty of "segregation for longer than four hours," Haw. Admin. R. § 17-201-12, Br. App. 16a, the prison convenes an "adjustment committee," which, in relevant respect, "shall" make "[a] finding of guilt" where: "(1) the inmate or ward admits the violation or pleads guilty," or "(2) the charge is supported by substantial evidence." Haw. Admin. R. § 17-201-18(b), Br. App. 21a. The prison rules make no precise specification of when the adjustment committee "shall" make "[a] finding of innocence"; indeed, the regulations make no reference to such sorts of findings at all. While therefore authorizing an adjustment committee to "convict" on proof that is less convincing than "substantial evidence," the prison regulations also fail to specify that any sanction issue upon a finding of guilt. After a finding of guilt, "[t]he adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation," *id.* § 17-201-19, Br. App. 22a. The committee need not impose any sanctions upon the prisoner. In addition, even if the regulations were viewed to constrain the discretion of the *committee* to order an inmate to segregation, the regulations do not constrain the authority of the warden (known as a "facility administrator") to order discipline:

> The facility administrator may . . . initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions. The administrator may [r]emand any matter to the adjustment committee for further hearing or rehearing if the administrator believes it to be in the interest of justice.

Haw. Admin. R. § 17-201-20(b), Br. App. 24a. No burden of proof rule (nor any other requirement) constrains the Administrator's discretion, and therefore an inmate can have no expectation of "acquittal" if there is neither "substantial evidence" of misconduct nor a confession.

3. Inmate Conner's Placement at Halawa Facility, the Incident of August 13, 1987, and Subsequent Prison Disciplinary Proceedings.

Respondent DeMont R.D. Conner is a Hawaii state prisoner who, at all relevant times, was serving a thirty-years-to-life sentence for convictions, entered in the Hawaii state courts, on two counts of attempted murder, five counts of kidnapping, three counts of robbery in the first degree, four counts of burglary in the first degree, seven counts of rape, sodomy, sexual abuse, or assault (in varying degrees), attempted escape, and various driving offenses. *See* J.A. 209-33. After being placed initially upon conviction at Oahu Community Correctional Center on April 23, 1984, Conner was transferred on September 3, 1985, to HCF, having been found guilty in disciplinary proceedings during the interim period of attempted escape, use of force or threats of force against staff members or their families, assault (two counts), refusal to obey orders (two counts), lying or providing false information, use of abusive or obscene language to a staff member, and harassment of prison employees. *See* J.A. 234-36.

On August 13, 1987, Conner, while housed at HCF, was charged with a variety of misconducts based upon

the following reports of Adult Corrections Officer Gordon Furtado:

> On Thu. Aug. 13, 1987, at approx. 0900 hrs. I ACO G. FURTADO while on duty in Module A along with ACO R. AHUNA escorted INMATE D. CONNER from his cell (quad II) to the module program area. At this time I informed inmate CONNER to move against the wall to be strip-searched before leaving the module. Inmate CONNER then stripped, faced the wall and squatted. I then asked inmate CONNER to put both hands on the wall and lift up both feet one at a time to which he did with no incident.
>
> I then asked him to step back, bend over and with both hands spread his buttocks so that I could check for contraband in the rectal area to which he said "Fuck!" in an angry tone of voice. This part of the search was thus completed, but as Inmate CONNER turned around and faced this writer he stared at me and stated "Why are you harassing me?" I informed him that I'm just following a routine procedure. He then stated in a very sarcastic voice "What you got something personal against me! Why you harassing me?" I then told him all you have to do is just listen and follow what I tell you to do but Inmate CONNER just kept on making sarcastic remarks about being harassed and the way that this writer was doing his job.
>
> At this time because of the tense atmosphere and also the very provoking attitude towards this writer, Sgt. SUMMERS who witnessed this incident canceled Inmate CONNER's privilege of religious counselling. Inmate CONNER was then escorted back to his cell by this writer and ACO D. COELHO.

> It should be noted that as Inmate CONNER went through the strip search procedures he moved very slow and questioned every move as if trying to hinder the search, hoping that this writer might overlook a certain area. Inmate CONNER appeared to be very unruly in his attitude toward this writer.

Exh. "K" to CR 83, Pet. App. A61-A62. Conner was given notice of the charges, and the opportunity to contest them before an adjustment committee. The Committee concluded that Conner had "use[d] physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant" (a high misconduct); "us[ed] abusive or obscene language to a staff member"; and engaged in "[h]arassment of employees" (the latter both low-moderate misconducts). Pet. App. A66. The Committee, in its August 31, 1987, disposition of the charges, gave the following as its contemporary statement for its decision:

> The Committee based their decision upon the inmate's statements that during the strip search procedure he turned around after squatting and looked at the ACO. He was then directed to "spread his cheeks" by ACO Furtado as part of the new strip search procedure. He felt angry, humiliated and apprehensive. He then "eyed up" ACO Furtado and was hesitant to comply. He further indicated that he dislikes ACO Furtado and feels he should not work on the module. The inmate admitted saying the word "fuck" during the procedure. The Committee also reviewed the submitted reports. Witnesses were unavailable due to move to the medium facility and being short staffed on the modules.

Exh. "K" to CR 83, Pet. App. A66. Conner was ordered by the Committee to serve 30 days in disciplinary segregation on the "high misconduct" charge, and eight hours in such segregation, to be served concurrently, on the two low-moderate misconduct charges. Pet. App. A67. Conner was ordered to commence his time in disciplinary segregation on August 31, 1987, *id.*, and served the full thirty days in the Special Holding Unit. On a review initiated pursuant to the appeal processes set forth at Haw. Admin. R. § 17-201-20(a), Deputy Administrator Henry Pikini found, on May 16, 1988, that the "high misconduct" charge was "inappropriate" under the facts of Conner's case, and "order[ed] that all references to a finding of guilt in this charge be expunged." Exh. "K" to CR 83, J.A. 249. The findings of guilt on the low-moderate misconduct charges remain on Conner's record.

C. Proceedings Below.

1. Proceedings in the District Court.

Before Deputy Administrator Pikini could act, but after Conner served his time in disciplinary segregation, Conner filed the instant lawsuit, *pro se*, in the United States District Court for the District of Hawaii on March 10, 1988, against Petitioner Cinda Sandin, who served as Chairman of the August, 1987, prison Adjustment Committee, as well as other officials, alleging a variety of defects in the committee process, including the allegedly improper denial of witnesses. CR 1, J.A. 23. Even before the lawsuit was served and answered, the District Court held that "due process" was required for "major misconduct" hearings, CR 3, J.A. 25 (order granting *in forma*

pauperis application). After an amended complaint was filed (CR 9, J.A. 27) naming additional defendants (J.A. 27-28), Defendants answered with a general denial and the defenses that the complaint and amended complaint failed to state a claim upon which relief can be granted, as well as qualified immunity, sovereign immunity, and the statute of limitations. CR 16, J.A. 30-31. Conner thereafter filed an affidavit accusing solely "Defendant Cinda Sandin" of "violat[ing] my right to due process when she denied me the right to question the correctional officer whom had written me up[.]" CR 22, J.A. 41. The District Court then issued a writ of habeas corpus *ad testificandum* and directed Defendants to respond to Conner's previously-filed motions for preliminary injunctions asking, somewhat ironically, that Conner be placed *back* in the Special Holding Unit as a matter of "protective custody" in order to prevent "alleged harassment by prison officials." CR 24, J.A. 43. Defendants' responded, *see* CR 26, J.A. 45-55, and ultimately the Magistrate Judge, after an evidentiary hearing, found that Conner "has failed to provide any specific reasons to justify action in separating Plaintiff from any staff members, and his claims of harassment are vague." CR 29, J.A. 62.[6] The District

[6] The Magistrate also rejected claims for equitable relief on hitherto unpled Eighth Amendment claims, finding that these problems "have been corrected for the most part," and that Conner otherwise had not shown an entitlement to equitable relief. J.A. 64. The Magistrate recommended, however, that Defendants be required to grant Conner greater access to the law library, and materials for gaining access to the Courts. *Id.* at 63-64.

Court, Kay, J., adopted the Magistrate's report and recommendation. CR 36, J.A. 66-71.

With leave of Court, CR 56, J.A. 97, Conner filed a second amended complaint, challenging various aspects of his conditions of confinement under the First and Eighth Amendments, and raised procedural due process challenges against Sandin's actions that allegedly "refused Plaintiff his right to question the charging A.C.O. who wrote me up," among other claims. CR 60, J.A. 169-90; *see id.* at ¶ 43. After Defendants moved for summary judgment on the ground, among others, that Conner's "placement did not affect a liberty interest subject to audit under the due process clause," CR 83, J.A. 199, Conner failed to raise any specific argument or evidence in opposition to summary judgment with respect to the issues surrounding the August, 1987, disciplinary hearing. *See* CR 90, J.A. 250-78. The Magistrate then recommended, CR 110, J.A. 325-52, and the District Court then granted, CR 115, Pet. App. A21-38, without elaboration, summary judgment on Conner's claims pertaining to the disciplinary hearing.[7] CR 116, Pet. App. A39. Conner appealed.

[7] Prior to granting summary judgment, the District Court rejected Conner's claim that Defendants were in contempt of the preliminary injunction's mandates regarding "access to the Courts." The Magistrate found "Defendants have taken reasonable steps to comply with the PI in good faith and have, in fact, substantially complied with its terms," and the District Judge adopted this recommendation." CR 108, J.A. 317, 324.

2. Proceedings in the Court of Appeals

The Ninth Circuit, in a published opinion by Judge Reinhardt, joined by Judges Browning and Norris, reversed and remanded in part. Pet. App. "A." In relevant provision,[8] the panel concluded that "Conner had a liberty interest, protected by the fourteenth amendment, in not being arbitrarily placed in disciplinary segregation." *Id.* at A3. To reach this conclusion, the panel relied entirely upon the "substantial evidence" provision of the prison rules. The Court found that the rule mandates "freedom from disciplinary segregation" if "the inmate does not admit guilt," and "the committee does not find substantial evidence," and thus "provide[s] explicit standards that fetter official discretion." *Id.* at A4. Then, "[h]aving found that Conner possessed a liberty interest in not being confined to disciplinary segregation," the

[8] In a portion of the decision not challenged by Petitioner or the remaining Defendants, the Ninth Circuit struck down, on procedural grounds, the application of the prison rule barring communication in a language other than English to what inmates asserted was Islamic prayer. *See* Pet. App. A9-A12. Because the Ninth Circuit did not forbid the prison to proscribe acts susceptible of communicative effects in languages other than English, *see id.* at A11 n.9, left open the issue of qualified immunity, *id.* at A12, and affirmed the grant of qualified immunity in related cases, *see Smith v. Elkins*, No. 93-15185 (9th Cir. Mar. 2, 1994), and State officials repealed the rule at issue on the "Islamic prayer" claim, certiorari was not sought as to the specific issues implicated by the Ninth Circuit's ruling pertaining to Conner's alleged claim "that his first and fourteenth amendment rights were violated when prison officials punished him for praying aloud in Arabic." *See* Pet. App. A9.

panel found, despite Conner's own incriminating statements, that Petitioner had not sufficiently demonstrated "the adequacy of its justification for denying an inmate the right to present witnesses." *Id.* at A8. The Court reversed the summary judgment, even as to claims for monetary relief against Petitioner, stating that "[t]he right to call witnesses at a disciplinary hearing has been clearly established since *Wolff v. McDonnell*[, 418 U.S. 539 (1974),] was decided[.]" *Id.* at A9. Although the Court, on a timely petition for rehearing, reinstated summary judgment for Defendants on other claims, it ultimately reversed and remanded the grant of summary judgment "as to Conner's claim regarding disciplinary segregation." *Id.*; *see also id.* at A18.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's intrusive order subjecting every assignment to disciplinary segregation in the Hawaii penal system to "Due Process" protection defeats Hawaii's fundamental interest in "summarily maintaining prison order," *State v. Alvey*, 67 Haw. 49, 55, 678 P.2d 5, 9 (1984), and, without significant justification in logic or policy, adds not only an unnecessary, but a harmful, layer of federal review of prison management decisions, in derogation of precepts of federalism and general deference to prison managers in the area of maintaining good order and security. *E.g., Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981).

a. There simply is no support in precedent for the recognition of "liberty interests" with respect to an

assignment to disciplinary segregation under any circumstances when such an assignment carries with it no loss of good time credits, and no necessary impact on parole. The Due Process Clause, standing alone, does not yield any "justifiable expectation" that an inmate will "be incarcerated [even] in any particular State," *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983), and this Court has never even intimated, except in *dicta*, that the risk of disciplinary segregation, *simpliciter*, could even trigger an analysis of a prison's rules for "substantive predicates" and "mandatory outcomes" that could give rise to a federally protected "liberty interest." *See, e.g., Hewitt v. Helms*, 459 U.S. 460, 472-78 (1983). Indeed, the Court has expressly reserved the question whether "prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 461 n.3 (1990). This Court can, and should, answer that question, and reverse on that basis.

b. As a general matter, assignment to disciplinary segregation is only one option, along a continuum, employed by prison administrators to maintain good order and security at the Nation's prisons. Accordingly, the process of subjecting prison regulations governing matters of privileges and segregation to "liberty interest" analysis, once begun, cannot be logically limited. The appropriate dividing line for purposes of "liberty interest" analysis is whether a disciplinary finding subjects an inmate to a loss of good time credits, or a necessary

impact on parole. Only in such instances does the prisoner's interest have "real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' " to trigger federally-mandated procedures, and concommitant judicial review. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Because "deprivations imposed in the course of the daily operations of an institution are likely to be minor compared to the release from custody at issue in parole decisions and good time credits," and because "the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials," *Hewitt*, 459 U.S. at 470, the Court should adopt a "bright-line" rule reversing the judgment here, regardless of any "mandatory" aspect of the Hawaii rules. Numerous States, like Hawaii, have structured certain disciplinary rules authorizing segregation in a way that does not affect good time credit or parole, and this Court should support these experiments by removing, in this limited and principled way, the burden of intrusive federal Due Process "liberty interest" review. Review of disciplinary findings where there is no loss of good time credit or necessary impact on parole should be left to the state courts. *See Paul v. Davis*, 424 U.S. 693 (1976); *cf. Albright v. Oliver*, 114 S. Ct. 807, 818-19 (1994) (Kennedy, J., joined by Thomas, J., concurring in the judgment).

2. The Court, in any event, should reverse the judgment of the Ninth Circuit on the narrower ground that Hawaii's rules relating to disciplinary segregation do not create "liberty interests" under any reading of this Court's Due Process caselaw, despite the "burden of proof" language of Haw. Admin. R. § 17-201-18(b), which states: "[a] finding of guilt shall be made where" "[t]he

inmate or ward admits the violation or pleads guilty" or "[t]he charge is supported by substantial evidence."

a. At a minimum, because Hawaii's rules fail to specify that segregation must be ordered upon a finding of guilt, Hawaii's rules fail to generate the sort of "mandatory" outcome required by *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 464. *Thompson*'s "two-way" mandatory outcome requirement is a sound one in the context of evaluating whether "liberty interests" are created in the prison context, and should be enforced here. *See Hewitt*, 459 U.S. at 470.

b. In any event, the Ninth Circuit fundamentally misconstrued § 17-201-18(b), as creating a mandate to acquit under certain circumstances, when the regulation's plain language creates only a mandate to *convict* if "substantial evidence" is present. Because of the broad discretion to order "disciplinary action" despite the lack of "substantial evidence" of misconduct, Conner simply had no "legitimate claim" to avoid disciplinary segregation. *See Thompson*, 490 U.S. at 460.

c. The Court of Appeals also erred in overlooking the provisions of Haw. Admin. R. § 17-201-20(b), which provides that the facility administrator (warden) "may . . . initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions." This broad language, which contains no limits on the evidence the administrator may consider, the scope of modifications he may make, or the reasons he may entertain for such modifications, confers "unfettered discretion," *see Olim v.*

Wakinekona, 461 U.S. 238, 249-50 (1983), which bars the conclusion that a "liberty interest" has been conferred.

d. The foregoing conclusions are reaffirmed by the fact that, in this context, the "burden of proof" rule invoked by the Ninth Circuit is, at most, procedural, and "an expectation of receiving process is not, without more, a liberty interest." *Olim*, 461 U.S. at 250 n.12.

3. The record independently supports reversal in that Conner could have been, and was on other occasions, assigned to virtually the identical conditions of confinement pursuant to the "classification" process, which is governed by rules nearly identical to those at issue in *Olim, supra*, where no "liberty interest" was found. *See* Haw. Admin. R. §§ 17-201-1 and -3 (Br. App. 2a-4a), and 461 U.S. at 242 & n.1. Any federal ability Conner had to avoid placement in the Special Holding Unit as a matter of disciplinary segregation was ousted by "the remaining field of discretion," *Wallace v. Robinson*, 940 F.2d 243, 248 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1563 (1992). Given that discretion, Conner's only interest is in avoiding the reputational impact of a disciplinary finding. This is not an interest protected under the Due Process Clause. *See Paul v. Davis*, 424 U.S. 693 (1976).

4. Notwithstanding the limited grant of certiorari, however the Court decides the "liberty interest" issue, it should overturn the Ninth Circuit's reversal, despite the doctrine of qualified immunity, of the District Court's judgment barring damages against Petitioner. Given the grant of certiorari on the "liberty interest" question, the

denial of immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is "plain error." *See Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). At a minimum, the Court should vacate the Ninth Circuit's judgment and remand for further consideration of the immunity issue.

ARGUMENT

The Ninth Circuit's Far-Reaching Ruling that Any Threatened Assignment to Disciplinary Segregation in Hawaii's Penal System Triggers Federally-Imposed Due Process Requirements is Contrary to This Court's Decisions, Defies Logic and Constitutional Principle and Policy, and Ignores the Broad-Ranging Deference this Court Has Recognized is Owed to State Prison Officials in Matters of Prison Security.

I. The Ninth Circuit's Decision That the Interest in Avoiding Disciplinary Segregation Could Ever Give Rise to a Federally Protected Liberty Interest Qualitatively Expands Federal Control Over State Prison Management in a Manner Which this Court Has Never Approved, and in Contradiction of Basic Principles of Institutional Deference and Comity that Inform this Court's Jurisprudence.

Although purporting merely to give federal "effect" to Hawaii's prison rules concerning disciplinary segregation, the Ninth Circuit's decision in this case could not more fundamentally undermine the "main purpose" of those regulations, namely "summarily maintaining prison order." *State v. Alvey*, 67 Haw. 49, 55, 678 P.2d 5, 9 (1984). Indeed, the Ninth Circuit's "final" determination – more than six years after the fact – that a federal defect *possibly*

lay in Halawa facility's treatment of inmate Conner with respect to the August, 1987, disciplinary decision, constitutes a classic instance "of ongoing oversight of a state program," marred by "extensive" "federal intrusion" and "[d]uplication of effort, inconvenience, and uncertainty." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 122 n.32 (1984) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943)). In launching the lower federal courts on the mission of policing every assignment to disciplinary segregation in Hawaii's prisons, the Ninth Circuit, even on its own assumptions about state law, failed to appreciate just how far its decision departs from the confines of this Court's precedents.

At the outset, it is important to stress what the Ninth Circuit's decision does not do. The exacting federal review of prison disciplinary records required by the Ninth Circuit's decision does not – and cannot – serve to restore "good time" credits,[9] or compel or even necessarily affect, parole.[10] Such review does not rid Hawaii's prisons of unsafe environmental conditions,[11] or deter violence against inmates, either from errant correctional officers,[12] or from other inmates;[13] nor does it serve to protect the important but limited First Amendment rights

---

[9] *Compare Wolff v. McDonnell*, 418 U.S. 539 (1974), *with Ponte v. Real*, 471 U.S. 491 (1985).

[10] *See Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).

[11] *See Helling v. McKinney*, 113 S. Ct. 2475 (1993); *Wilson v. Seiter*, 501 U.S. 294 (1991).

[12] *See Hudson v. McMillian*, 112 S. Ct. 995 (1992).

[13] *See Farmer v. Brennan*, 114 S. Ct. 1970 (1994).

inmates enjoy despite their incarcerated status.[14] Nor does it even protect state inmates from irrational and arbitrary assignments to disciplinary segregation. After all, even without procedural Due Process protections, inmates would be entitled under Equal Protection analysis to treatment that meets minimum rationality,[15] and, *a fortiori*, would be protected from assignment to segregation status on the basis of race, sex, national origin, religion, or alienage.[16]

No doubt in light of these considerations, this Court has studiously avoided any concrete holding that could be viewed as supporting the proposition that an assignment of a state convict to disciplinary segregation, *simpliciter*, can *ever* implicate a "liberty interest" under the due process clause. As stated in *Montanye v. Haynes*, 427 U.S. 236 (1976), "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison

---

[14] *See Thornburgh v. Abbott*, 490 U.S. 401 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Turner v. Safley*, 482 U.S. 78 (1987); *cf. Churchill v. Waters*, 114 S. Ct. 1878 (1994) (anti-retaliation). *See also* the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993).

[15] *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448, 450 (1985) ("mere negative attitudes" and "irrational prejudice" cannot be the basis to sustain state action).

[16] *See id.* at 453 (Stevens, J., joined by Burger, C.J., concurring) (noting "virtually automatic invalidation of racial classifications" and "differing results in cases involving classifications based on alienage, gender, or illegitimacy").

authorities to judicial oversight." *Id.* at 242. "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of it prisons." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). The Due Process Clause, standing alone, does not yield any "justifiable expectation" that an inmate will "be incarcerated [even] in any particular State." *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983).

Recognizing this, the Ninth Circuit grounded its decision in the belief that "a liberty interest in not being confined to disciplinary segregation" was "created by state law." Pet. App. A3, A4. The panel relied on *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1990), but neither of those decisions warrant the expansive interpretation given them by the Court of Appeals.

Although, in *Hewitt*, the Court stated that a liberty interest had been created by Pennsylvania's rules governing administrative detention, the Court ultimately found that no Due Process violation had been shown. *See* 459 U.S. at 472-78. *Hewitt's* statements that the State had "created a protected liberty interest" are thus *dicta*, and "[i]t is the holdings of [the Court's] cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Insurance Co.*, 114 S. Ct. 1673, 1676 (1994) (Scalia, J., for a unanimous Court).

Similarly, in *Thompson*, the Kentucky Department of Corrections, and the Attorneys General of more than thirty states, urged the Court "to adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official

discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " 490 U.S. at 455 n.*, 461 n.3.

In *Thompson*, the Court was able to avoid accepting this general and sensible proposition only because it found that the prison regulations and procedures regarding visitation "lack[ed] the requisite relevant mandatory language." *Id.* at 465. "Inasmuch as a 'bright line' " suggested by the Attorneys General "[wa]s not necessary for a ruling in favor of petitioners," the Court "refrain[ed] from considering it at this time," and "le[ft] its resolution for another day." *Id.* at 462 n.3.

Indeed, the Court has consistently refused to decide whether "the degree of 'liberty' at stake in loss of privileges" ever triggers Due Process, and "thus whether some sort of procedural safeguards are due when only such 'lesser penalties' are at stake." *Baxter v. Palmigiano*, 425 U.S. 308, 323 (1976).

As an analysis of the Hawaii penal regulations in this case shows, *see supra* pp. 5-9, no meaningful line can be drawn between "privileges" and "segregation." Inmates in virtually all penal institutions are on "lockdown" for part of the day, and the difference between "segregation" and "general population" modules is defined largely by the extent of "privileges" that are made available to the inmates. Indeed, penological justifications and social policy to one side, longer showers, more extensive outdoor recreation, more frequent visits with family, or greater access to books, newspapers, television, radio, or recorded music, are undoubtedly for many inmates

(indeed for most objective observers), more important than having the "opportunity" to socialize face-to-face with fellow maximum security convicts in a "general population" module. The enduring irony of Due Process claims challenging imposition of disciplinary segregation lies in the frequency of arguments by inmates in general population units who claim that conditions there, by reason of *over*crowding, violate the Eighth Amendment, as enforced by the Due Process Clause's substantive reach. *See Rhodes v. Chapman*, 452 U.S. 337 (1981); *cf. Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (inmate claiming that placing him into general population violated his rights under Eighth Amendment). Respondent Conner is no exception, for at the very time he was challenging his August, 1987, placement into disciplinary segregation, he was demanding a federal judicial order placing him *back* in the SHU under the rubric of "protective custody."

In fact, *Wolff v. McDonnell*, 418 U.S. 539 (1974), the leading case in this area, and its progeny, make clear this Court's strong reluctance to subject prison regulations that have no necessary impact on good time credits or parole to a "liberty interest" inquiry. In *Wolff*, Nebraska created a scheme for the forfeiture of good-time credits, without providing Due Process protections. The Court analyzed "the process due," and ordered equitable relief. The Court did so, however, only after finding that, because "the State ha[s] created the right to good time and itself recogniz[ed] that its deprivation is a sanction authorized for major misconduct," "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those

minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. Thus, although the Court's opinion in *Wolff* contains *dicta* to the effect that "it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue," 418 U.S. at 539 n.19, the recent decisions of this Court since *Wolff* have characterized *Wolff* as involving a loss of good-time credits only. *See, e.g., Heck v. Humphrey,* 114 S. Ct. 2364, 2370 (1994) ("*Wolff* involved a challenge to the procedures used by state prison officials to deprive prisoners of good-time credits"); *Thompson,* 490 U.S. at 461 (describing *Wolff* as involving solely "good-time credits"); *Hewitt,* 459 U.S. at 460 ("in *Wolff, supra,* we were dealing with good-time credits which would have actually reduced the period of time which the inmate would have been in the custody of the government").[17] *Hewitt* stresses:

---

[17] In *Wright v. Enomoto,* 462 F. Supp. 397 (N.D. Cal. 1976), *summarily aff'd,* 434 U.S. 1052 (1978), the Court summarily affirmed a decision requiring federally-imposed procedures prior to the placement of inmates in "maximum security" units at San Quentin, Folsom, Soledad, and Tracy penitentiaries in California. The District Court was presented, in that case, with uncontradicted evidence that inmates were placed in "maximum security" cells, which had no "fresh air or daylight" whatsoever, and were "poor[ly]" ventilated and lit, "for months, even years, without hope of release," either "for no reason at all," or for reasons indicating that the prison administrators were engaging in purposeful racial discrimination against Mexican-American inmates. *See* 462 F. Supp. at 400-01, 404. *Compare* Haw. Admin. R. § 17-201-19(c)-(h) (conditions in segregated housing). Given that the remedies imposed by the *Wright* court could have been justified by the undisputed risk of "permanent psychological, if not, indeed, physical, damage," to inmates in the unit, *cf. Vitek v. Jones,* 445 U.S. 480, 493 (1980), by the strong inference of race discrimination, *cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971), or by the apparent total irrationality of the placements into maximum security, *cf. Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985), *Wright* has, at best, limited impact on this case, where the District Court repeatedly found the conditions of confinement to be adequate, Conner either did not appeal from these findings or was rebuffed on appeal, and there was ample evidence justifying the rationality of the sanction. *See Wisconsin Department of Revenue v. Wrigley Co.,* 505 U.S. ___, ___ n.2 (1992). For the reasons developed in this Brief, moreover, *Wright* is wrong and the Court should not feel constrained to follow it here. *See generally Edelman v. Jordan,* 415 U.S. 651, 670-71 (1975).

> The deprivations imposed in the course of the daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and good-time credits. Moreover, the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials, see *Meachum v. Fano, supra,* at 225. These facts suggest that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to "liberty," different from statutes and regulations in other areas.

459 U.S. at 470.

The Ninth Circuit's expansion of Due Process requirements into a domain that this Court has carefully avoided for more than twenty years is more than significant doctrinally. It has enormous practical consequences for the States, for the judicial system, and for the inmates themselves. As this Court has observed in the parole

context, the leveraging of privileges conferred pursuant to state law into "liberty interests" distorts the incentives for States even to attempt to confer those benefits, lest they find themselves embroiled in extensive constitutional litigation over the wording of prison regulations, and, if a "liberty interest" is found, over the particulars of compliance with Due Process requirements in specific cases. To borrow from this Court's language in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979), if disciplinary determinations "are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail" the privileges that are gained by avoiding discipline. Hawaii, after all, could assign *every* inmate convicted of one of a specified set of felonies to solitary confinement for the entirety of their sentences, and avoid extensive federal procedural Due Process review. Expansive "federalization" of "liberty interests" with respect to disciplinary segregation decisions therefore has a significant potential to thwart "salutary development" of penological programs and "desirable experimentation" by the States. *See Hewitt*, 459 U.S. at 471.

Moreover, the specific "liberty interest" problem posed by this case is not limited to Hawaii. Although many States do employ good time credit, and do make loss of good time credit a potential consequence of an inmate's violation of prison rules, the vast majority of States have either created categories of misconduct that can never lead to a loss of good time credit,[18] left it

[18] It appears that only in Minnesota, Rhode Island, and South Carolina does a misconduct finding always lead to a loss of good-time credit. *See* Minn. Dep't of Corrections Inmate Dis. Reg. (1988); R.I. Dep't of Corrections Op. Mem. 1.18.02 at 16

within the discretion of prison administrators to determine whether good time should be forfeited,[19] or both. In

(Sept. 1, 1994); S.C. Dep't of Corrections Inmate Guide at 7. Pennsylvania, like Hawaii, has no good time credits, and at least the following States have categories of prisoner misconduct that cannot lead to a loss of good time credits: California (*see* 15 Cal. Code of Regulations (Barclays) § 3314(d) (1988)); Georgia (*see* Ga. Bd. of Corrections Rules § 125-3-2.08(a) (1990)); Idaho (*see* Idaho Dep't of Corrections Policy and Proc. Man. § 318-C, Attachment "A" at 7 (Idaho has abolished good time credits for persons convicted after 1986)); Illinois (*see* Tit. 20, Ch. 1, Subch. e, Ill. Dep't of Corrections Rules 401-02); Indiana (*see* Ind. Dep't of Correction Adult Disciplinary Policy Procedures § 30 (1990)); Kentucky (*see* Ky. Corrections Policies & Proc. 15.2 at 2-3, 8-9 (1992)); Maryland (*see* Md. Div. of Correction Reg. No. 105-1 at 8 (sentencing matrix) (deprivation of good time credits not available for inmates with specified previous good conduct records)); Missouri (*see* Mo. Dep't of Corrections Inmate Rule Handbook at 18 and Mo. Dep't of Corrections Institutional Services Policy & Proc. Man. No. IS19-1.1 (June, 1994) (Attachments "A" and "B")); Nevada (*see* Nev. Dep't of Prisons Code of Penal Disc. 28 (1993)); New York (*see* N.Y. Dep't of Corrections Proc. for Implementing Standards of Inmate Behavior Parts 252 and 253 (violation and disciplinary hearings) (1983)); Texas (*see* Texas Dep't of Criminal Justice Disciplinary Rules and Procedures for Inmates at 3-4 (1991)); Virginia (*see* Va. Dep't of Corrections, Division of Adult Institutions, Operating Pro. 861-7.3 (April, 1992)); Washington (*see* Wash. Admin. Code § 137-28-105m (1991)); and Wyoming (*see* Wyo. Dep't of Corrections Code of Inmate Discipline § 5(b) (Mar. 1994)).

[19] *See* Ala. Dep't of Corrections Admin. Reg. 403 (June 17, 1992); 22 Alaska Admin. Code § 05.470 (April 1994 Cum. Supp.); Ariz. Dep't of Corrections Rules of Discipline 12 (1986); Ark. Dep't of Correction Disciplinary Rules and Reg. § 831 at 23 (1990); 15 Cal. Code of Regulations (Barclays) § 3315(d) (1988); Colo. Dep't of Corrections Code of Penal Discipline at 32-35 (1981); Conn. Dep't of Correction Admin. Dir. 9.5 (1994); Del. Bur. Prisons Pro. No. 4.2 at 15-16 (1992); Fla. Dep't of Corrections R. 33-22.008 (1991); Ga. Bd. of

the latter situation, if good time credit is not forfeited, inmates subjected to disciplinary segregation or loss of

---

Corrections Institutional and Center Ops. § 125-3-2.08 (1990); Idaho Dep't of Correction Policy and Proc. Man. § 318-C at Attachment "A"; 20 Ill. Dep't of Corrections R. Part 504 Table A; Ind. Dep't of Correction Adult Disciplinary Policy Procedures § 30 (1990); Ky. Corrections Policies & Proc. 15.2 at 9 (1992); La. Dep't of Pub. Safety & Corrections Disciplinary Rules and Procedures for Adult Inmates at 12-14 (1994); Me. Dep't of Corrections Disciplinary Procedure Ch. 15.1 (1994); Md. Div. of Correction Reg. No. 105-1 at 8 (sentencing matrix) (1988); 103 Com. Mass. Reg. 430.25(3)(b), 430.25(5); Mich. Dep't of Corrections Policy Dir. 03.03.105 at 9 (1990); Miss. Dep't of Corrections Inmate Handbook at 7 (1992); Mo. Dep't of Corrections Inmate Rule Handbook at 18 and Mo. Dep't of Corrections Institutional Services Policy & Proc. Man. No. IS19-1.1 (June, 1994) (Attachments "A" and "B"); Mont. Dep't of Corrections & Human Services Inmate Disciplinary Policy at 11 (1989); 68 Neb. Dep't of Correctional Services Ch. 5 at 23; Nev. Dep't of Prisons Code of Penal Discipline at 42-43 (1993); N.H. Dep't of Corrections Policy & Proc. Dir. 1.5.25 (1993) (Appendix II); N.J.R. 1991 d.276 § 10A:4-5.1 (1991); N.M. Corrections Dep't Policy CD-090301 at Attachments "A"-"F" (1991); N.Y. Dep't of Corrections Proc. for Implementing Standards of Inmate Behavior Part 254 (1983); N.C. Div. of Prisons Inmate Disc. Procedures 2B.0200 at 6-8 (1991); N.D. State Pen. Inmate Handbook at 15 (1994); Ohio Admin. Code § 5120-9-56 (1988); Okla. Dep't of Corrections Policy and Operations Manual OP-060125 (1993), at Attachment "A"; Ore. Admin. R. § 291-105-069(1); S.D.C.L. § 24-2-9 (1994); Tenn. Dep't of Correction Admin. Policies & Proc. 502.01 at 16 (1993); Texas Dep't of Criminal Justice Disciplinary Rules and Procedures for Inmates at 13-14 (1991); Vt. Dep't of Corrections Directive 410.3 and Appendix "I"; Va. Dep't of Corrections, Division of Adult Institutions, Operating Pro. 861-7.3 (April 1992); Wash. Admin. Code § 137-28-030 (1992); W. Va. Dep't of Corrections Policy Directive 670.00 at 16 (1991); Wyo. Dep't of Corrections Code of Inmate Discipline at 17 (1994).

privileges alone have no greater standing than Respondent to complain of alleged procedural Due Process defects in their hearings.

Federal judicial review of assignments to disciplinary segregation and denial of other privileges, perhaps even more so than federal review of the "custody" of state prisoners under the federal habeas corpus statute, 28 U.S.C. § 2254, imposes untoward costs on the legal system, and undermines the values of "[o]ur system of federalism." *Greenholtz*, 442 U.S. at 13; *cf. Herrera v. Collins*, 113 S. Ct. 853 (1993) (where "life" was at stake). It discourages flexible responses to "the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens." *Rhodes v. Chapman*, 452 U.S. at 352. Relatedly, and perhaps most disturbing of all, it does so in a way that retards the effectiveness and finality of one of the most important security measures at the prison – the disciplinary system – a measure whose function "is peculiarly left to the discretion of prison administrators." *Id.* at 349 n.14. If there were ever an area where the urge to federalize state-conferred privileges ought be restrained, this is it. *See Farmer v. Brennan*, 114 S. Ct. 1970, 1976-77 (1994); *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); *Whitley v. Albers*, 475 U.S. 312, 320-22 (1986); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Assuming, *arguendo*, that Hawaii's rules operated in the "mandatory" manner characterized by the Court of Appeals, Hawaii law would undoubtedly provide for prospective equitable relief for their breach, see *Pele Defense Fund, Inc. v. Paty*, 73 Haw. 578, 609, 837, 837 P.2d 1247, 1266 (1992), and, arguably, even for a tort remedy, *see Nakahira v. State*, 71

Haw. 581, 583, 799 P.2d 959, 961 (1990). "Liberty interest" analysis, like other features of Due Process doctrine, has been, and should be, respectful of "the delicate balance between state and federal courts" and of "the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of the States, as well as by the Constitution." *Albright v. Oliver*, 114 S. Ct. 807, 818-19 (1994) (Kennedy, J., joined by Thomas, J., concurring in the judgment).

Indeed, this Court's perhaps most important recognition of the limits of "liberty interest" analysis, *Paul v. Davis*, 424 U.S. 693 (1976), provides powerful justification for reversal of the judgment below. For even assuming that Hawaii law provided "substantive predicates" and "mandatory outcomes" as the Ninth Circuit believed, the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. These comity concerns ought to be at their height in the realm of internal prison management. Unlike situations where the inmate faces the loss of good time credits or parole, the potential "loss" in being transferred from general population to the Special Holding Unit simply does not have "real substance" in the constitutional sense this Court announced in *Wolff* twenty years ago. *See* 418 U.S. at 557. Regardless of any "mandatory" language Hawaii may have used in constraining assignments to the SHU, the ability to avoid such assignments is not, and ought not to be viewed to be, "sufficiently embraced within Fourteenth Amendment 'liberty' " to mandate federally imposed procedures that "insure that [any] state created right is not arbitrarily abrogated." *Id.*

For these reasons alone, and apart from the specific doctrinal flaws in the Ninth Circuit's judgment which are discussed, *infra*, the decision below should be reversed.

II. Particularly Given the Substantiality of the Question Whether Prison Rules Concerning Disciplinary Segregation Could Create a Liberty Interest, the Ninth Circuit's Judgment Should Be Reversed Because of the Express Ability of the Adjustment Committee to Impose No Sanction, the Implied Discretion of the Committee to Convict, the Express and Unfettered Authority of the Warden to Overrule an Acquittal, and the Procedural Nature of a Burden of Proof Rule.

As Part I demonstrates, the broad question whether prison rules pertaining to disciplinary segregation and related losses of privileges should ever give rise to a "liberty interest" under the Due Process Clause raises at a minimum substantial and important issues that, if acted upon by this Court, would affect almost every penal system in the Nation.[20] Given this fact, the Ninth Circuit was plainly wrong in holding that Hawaii's "burden-of-

---

[20] Because state law would almost certainly provide some form of judicial review for compliance with any mandates of the adjustment process, such as they are, *see Pele Defense Fund, Inc., supra*, this case does not present the "difficult question of constitutional law" concerning the "extent to which legislatures may commit to an administrative body . . . unreviewable authority." *Cf. Superintendent v. Hill*, 472 U.S. 445, 450 (1985) (good time credit case). Rather, the "difficult question" here is whether the Due Process Clause *federalizes* state law claims challenging disciplinary findings that neither implicate loss of good time credits nor necessarily affect parole.

proof" rule gave rise to the "substantive predicates" and "mandatory language" that this Court, in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1990), found, at the least, must be present before a prison rule will trigger Due Process analysis. *Cf. Frisby v. Schultz*, 487 U.S. 474, 483 (1988) ("statutes will be interpreted to avoid constitutional difficulties"). Generally speaking, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,' " *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). For these reasons, this Court has it within its prerogative to reverse the judgment below on narrow grounds. *See United States v. Leon*, 468 U.S. 897, 905 (1984). *See also* S. Ct. R. 14.1. Given the nature of Hawaii's regulations, the judgment presents such grounds at least four times over.

A. *Thompson*'s Two-Way Mandatory Outcomes Test Is Appropriate for Evaluating Whether States Have Created "Liberty Interests" In their Regulations Governing the Internal Management of their Prisons; Under that Test, the Judgment Below is Plainly Wrong.

Thompson's "substantive predicates"/"mandatory outcomes" test, as a means of constraining the category of cases where internal prison rules trigger Due Process requirements, first demands that there be " 'substantive predicates' to guide the decisionmaker," and then "requir[es] that a particular result is to be reached upon a finding that the substantive predicates are met." 490 U.S. at 463-64. In *Thompson* itself, the Court reasoned that, even though "[v]isitors *may* be excluded if they fall

within one of the described categories," "they need not be," and hence the rules were "not mandatory." *Id.*

Here, as the Ninth Circuit interpreted Hawaii's rule, inmates found by "substantial evidence" to have committed disciplinary infractions "may be" assigned to segregation for a period of time, but they "need not be." *Id.* This, without more, ought to have compelled the Ninth Circuit to affirm with respect to the disciplinary segregation issues. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Instead, the Ninth Circuit followed the reasoning of the *dissent* in *Thompson*, *see* 490 U.S at 475 (Marshall, J., joined by Brennan, and Stevens, JJ., dissenting). Although this "two-way" mandatory outcomes analysis may be inappropriate in other settings, *see Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2341 (1994), *Thompson's* reliance on that formulation merely recognizes that "regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas." *Hewitt, supra*, 459 U.S. at 470. Other federal courts have dutifully followed *Thompson's* reasoning in the prison context, *see Burgin v. Nix*, 899 F.2d 733, 735 (8th Cir. 1990); *Woods v. Thieret*, 903 F.2d 1080, 1083 (7th Cir. 1990), and neither the Court of Appeals nor Respondent offer any good reason why *Thompson's* reasoning should not be applied to these facts.

For this reason alone, the judgment should be reversed.

B. The Ninth Circuit's Decision Incorrectly Reads Hawaii's Disciplinary Regulations to Constrain the Situations Where the Adjustment Committee may Convict.

The judgment below independently defies the rule that "the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found." *Thompson*, 490 U.S. at 464 n.4. Whereas the Ninth Circuit held that under Haw. Admin. R. § 17-201-18(b) "the inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt," the rule simply provides no such thing. Rather, the rule states that "[a] finding of *guilt* shall be made where" "[t]he inmate or ward admits the violation or pleads guilty" or "[t]he charge is supported by substantial evidence." Br. App. 21a (emphasis added).[21] While the rules require the committee to find "substantial evidence" before deciding, under the *compulsion* of the

[21] Indeed, the structure of the regulation, which mandates conviction upon a finding of substantial evidence, is nothing more than a means of assuring that lower-level subordinates take seriously their constitutional duty to maintain order and thereby prevent injuries to inmates, staff, and visitors. *See Farmer v. Brennan*, 114 S. Ct. 1970 (1994); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Although Petitioner submits that the lack of any mandatory outcome eliminates any "liberty interest" for bystanders who might be caught up in a fray triggered, for example, by Conner's disrespectful remarks during a strip search, if there is a bias in the rules it is *against* acquittal. Given the inmates at Halawa, this bias is warranted. *See* Sandin Aff. ¶ 12 (CR 83; J.A. 207) ("[a]pproximately one-half the Module A inmates have serious mental problems and many others are violent").

adjustment process, whether and to what extent to order an inmate segregated, the rules *permit* the committee to convict, in its discretion (and to order disciplinary segregation), on the basis of *any* proof at all, so long as the disciplinary action is "based upon more than mere silence." *Id.* This most minimal of requirements hardly can oust the discretion of the Adjustment Committee sufficiently to create a liberty interest. *Cf. Olim*, 461 U.S. at 242-43 (administrator could "hold in abeyance" recommended decision only upon his determination that the action "jeopardize[d] the safety, security, or welfare of the staff, inmate . . . , other inmates, . . . institution, or community"). This Court should reverse.

C. Irrespective of the Constraints on the Adjustment Committee, Hawaii Grants the Warden Unfettered Discretion to Override the Adjustment Committee, Even if there is No Substantial Evidence of a Rule Violation.

Irrespective of the constraints on the Adjustment Committee, the Hawaii regulations provide that "[t]he facility administrator may . . . initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify *any* committee findings or decisions[.]" Haw. Admin. R. § 17-201-20(b). There is no requirement that the Administrator must find substantial evidence, indeed, *any* evidence of misconduct, in order to make such a "modification." There is no limit on the extent to which a "finding or decision" may be "modified." Indeed, there is no constraint on the reasons why the Administrator might "modify" a "finding or decision." Although Conner himself was the beneficiary

of this authority, and as a result of the Administrator's action Conner's "major misconduct" was expunged, *see* Pet. App. "G"; J.A. 249, what the Court of Appeals overlooked is that the warden's "discretion to modify any committee findings or decisions" cuts both ways.

That "discretion" is totally unfettered when it comes to overturning the dismissal of misconduct charges, or the refusal to impose sanctions, even if such dismissals might be compelled, at the committee level, by a "substantial evidence" burden of proof. In this sense, Hawaii's Adjustment Committees are advisory only, and this case is on all fours with *Olim v. Wakinekona*, 461 U.S. 238 (1983). "If officials may transfer a prisoner 'for whatever reason or for no reason at all,' " "there is no [liberty] interest for process to protect." *Id.* at 250.

Hawaii, and all other States, have the right to structure their disciplinary systems to provide less leeway to subordinate officials. In fact, such structuring is commendable both from a penological as well as a constitutional perspective, given the fact that such lower-level officials "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee." *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (good time credits).

By contrast, Hawaii assigns to its facility administrators the broadest discretion, in recognition of the wider "world view" the most senior prison administrator obtains by experience with a run of cases, and the facility-wide perspective of what strategy "best fits the agency's overall policies, and indeed, whether the agency has enough resources to under-

take the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

In holding that imposition of a "burden of proof" mandate at the committee level sufficiently constrained the State's ability to confine Conner and other inmates in disciplinary segregation, the Ninth Circuit erred. Given the Administrator's discretion, Conner, in the end, had no more than " 'a unilateral hope,' " rather than "a legitimate claim of entitlement" to avoid disciplinary segregation. *See Thompson*, 490 U.S. at 460. Even if the Ninth Circuit's construction of the Adjustment Committee's discretion was correct, "the prison Administrator's discretion to transfer an inmate [to disciplinary segregation] is completely unfettered." *Olim*, 461 U.S. at 249. Because of this fact, the judgment below is wrong, and should thus be reversed.

D. The Asserted Constraint Here is Merely Procedural, and Does Not Give Rise to Any "Liberty Interest" in Avoidance of a Transfer to Disciplinary Segregation.

The Ninth Circuit's judgment, even on its own terms, also makes nonsense of the settled understanding "that an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim*, 461 U.S. at 250 n.12.

As this Court has recognized, burden-of-proof rules constitute one of a number of "procedural protections" which society may choose to impose as a bulwark against adverse government action. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). A "standard of proof" thus goes to "process requirement[s]," *id.* at 755. Once federal law determines that there is a "liberty interest" at stake, " 'the fact that the state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action,' " *id.* (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)), is of no moment. It is for this very reason that the doctrine of *procedural* Due Process speaks to the adequacy of state burden-of-proof rules in those areas where "liberty interests" are put at risk.

In this case, however, the Ninth Circuit has inverted this Court's Due Process analysis by divining the presence of a federally protected "liberty interest" based merely on the existence of Hawaii's "own procedures." *Id.* That existence, at most, however, creates only "an expectation of receiving process," and does not create "a liberty interest." *Olim, supra.*

Indeed, the failure to reverse the judgment would not only disregard settled precedent, it would federalize virtually any administrative action in which a burden of proof played a role. Burdens of proof, in a wide variety of contexts, are only gateways through which administrative discretion is invoked. *Cf.* S. Ct. R. 10.1. While overcoming a burden of proof is often necessary to obtaining administrative relief, it is not always sufficient, and, when it is not sufficient, there can be no "legitimate claim of entitlement." *Thompson*, 490 U.S. at 454. Here, although the "substantial evidence" rule operates as a directive

outlining situations where the Adjustment Committee "shall" find guilt, it does not limit the circumstances where the Committee "may" take "action," nor, more importantly, does it in any way limit the Administrator's discretion to "modify any finding or decision" in any manner whatsoever.

This truth confirms that the judgment must be reversed.

III. Because Inmate Conner Could Have Been (Indeed Was Expressly on Other Occasions) Confined to the Special Holding Unit on the Basis of Undeniably Discretionary Determinations Under Hawaii's System for Classification or Nonpunitive Segregation, He Had No "Liberty Interest" at All in this Case.

The Ninth Circuit's judgment not only ignores the discretion of Hawaii's prison administrators, within the adjustment process, to subject an inmate to segregation in the Special Holding Unit. It ignores as well the reality that "the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence," *Hewitt*, 459 U.S. at 469, and that Hawaii's rules for transferring inmates to the Special Holding Unit, as a matter of general classification policy, or under the power to administratively or protectively segregate an inmate, confer no "liberty interests."

No serious dispute could be raised that Hawaii's general classification procedure (Br. App. 2a-4a) gives

rise to federally protected "liberty interests." The classification rule is virtually identical to that reviewed in *Olim v. Wakinekona*, in which no "liberty interest" was found. *See* J.A. 243 (old rule). The criteria for administrative segregation permit transfer for reasons of prison safety or "any similarly justifiable reason," Br. App. 25a; *cf. Hewitt v. Helms*, 459 U.S. at 472. "Protective custody" can be ordered whenever "there is reason to believe that such action is necessary." Br. App. 25a. Each of these essentially standardless regulations provide "unfettered discretion" and create no "liberty interest" in a transfer. *See Olim, supra.*

As the Seventh Circuit observed in a related context:

> Illinois has a rule of the form: "The warden may do *A* for any reason, but if that reason is *M* the warden must prove *M* before acting." One could restate this as: "The warden may do A for any reason except M." A in our case is changing the prisoner's job assignment. M is misconduct. Wallace may have taken hooch to his job at the tailor shop, which violates a rule of the prison. He may have been a goldbrick, knocking off work early. He may have gotten his supervisor's goat, which violates no rule but may make it wise to move him. Or he may have done all three. Whether the state employed procedures adequate to find the "true" reason matters only if a rule in the form we have described creates a liberty or property interest.

Wallace v. Robinson, 940 F.2d 243, 246 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1563 (1992). Here, particularly given the similarities between assignment to SHU as a result of a "Phase I" classification and assignment to

SHU as a result of a misconduct finding, there is no good argument that placement in the general population modules was ever anything " 'securely and durably' " Conner's. *Id.* Conner, indeed, spent many weeks in the SHU as a result of a Phase I classifcation. *See* J.A. 236-42. Even if all the Ninth Circuit assumed about disciplinary segregation were true, the decision below exists in a vacuum, and ignores "the remaining field of discretion," 940 F.2d at 248, which was independently "so large that no prisoner ha[d] a legitimate claim of entitlement" to avoid the *conditions* of disciplinary segregation. *Id.* Just as a prisoner "whose job assignment may be changed for any reason lacks such a substantive interest" which triggers Due Process, "even if the state has promised elaborate procedures before using a particular reason (misconduct) as the basis of action," *id.*, Conner had no "liberty interest" in remaining in general population. To the extent the misconduct finding marred his record, such a mark is in no meaningful way different from any other alleged libel, which does not state "a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *see id.* at 233 (discussing *Paul v. Davis, supra*).

For these reasons as well, the judgment must be reversed.

IV. The Determination of the Court of Appeals that Petitioner Was Not Entitled to Qualified Immunity is Plain Error; Regardless of the Court's Disposition of the Question Presented, the Court Should Remand with Instructions to Dismiss the Damages Claims Against Petitioner, or, at a Minimum, for Reconsideration of those Claims and the Defense of Qualified Immunity in Light of the Grant of Review.

Because this Court expressly limited the grant of review to Question 1 of the Petition, Petitioner accepts

that, unless the Ninth Circuit's collateral ruling – that the summary judgment in her favor as to the damages issue could not be sustained under the doctrine of qualified immunity – is "plain error," this Court will not entertain the immunity issue. *See* S. Ct. R. 24.1(a). If, as Petitioner urges, the Court reverses the judgment below for any of the reasons urged above, the issue will be moot. If the Court does not so reverse the judgment, however, the Court should address the immunity issue under the "plain error" test.

Qualified immunity is a "protective" doctrine that " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *Burns v. Reed*, 500 U.S. 478, 495 (1991). Since this Court adopted an "objective" test for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it has been clear "that officials performing discretionary functions are not subject to suit when [federal] questions are resolved against them only after they have acted." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). While this Court's decision granting review does not expressly acknowledge uncertainty in the law, it impliedly establishes that the Ninth Circuit decided, at a minimum, "an important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10.1(c). *See also id.* 10.1(a). Vindication of this Court's own decision to grant review, whether Petitioner wins or loses on the merits of the Question Presented, at a minimum requires reversal of the Ninth Circuit's denial of immunity at the summary judgment stage, for that denial of immunity implicitly assumed that the existence of a "liberty interest" was "clearly established." At the very least, the Court should, if it rules against Petitioner on the "liberty interest" issue, vacate

the judgment and remand for further review of the issue of qualified immunity, in light of the fact that plenary review was granted by this Court.

CONCLUSION

For the foregoing reasons and those stated by the Amici States, the judgment of the Court of Appeals should be reversed. Should the Court rule against Petitioner on the "liberty interest" issue, the Court nonetheless should reverse the Ninth Circuit's denial of immunity under the "plain error" standard, or at a minimum, should vacate the judgment denying immunity and remand to the Court of Appeals for further consideration in light of the grant of certiorari and the Court's opinion in this case.

Dated: Honolulu, Hawaii, November 15, 1994.

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
KATHLEEN M. SATO
Deputy Attorneys General
State of Hawaii
**Counsel of Record*

Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Petitioner
Cinda Sandin, Unit Team
Manager, Halawa
Correctional Facility

TITLE 17

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

SUBTITLE 2 CORRECTIONS DIVISION

CHAPTER 200

ADMINISTRATIVE PROVISIONS

§17-200-1 *General provisions.* (a) This subtitle shall govern the corrections division of the department of social services and housing, State of Hawaii. Each individual facility may adopt rules governing its unique situation pursuant to chapter 353, subject to the approval of the director of the department of social services and housing and the governor. However, supersession of these rules shall be permitted only where necessary due to the unique characteristics of the facility.

(b) One copy of the corrections division and individual facility rules shall be given in handbook form to each inmate or ward and all staff personnel. Receipt of the rules shall be noted in each inmate's, ward's and employee's file. The rules shall also be posted at each facility. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-200-2 *Prior rules and regulations.* All prior rules and regulations of the corrections division are repealed. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-200-3 *Purpose.* Inmates and wards shall have all those rights and responsibilities as set forth in this subtitle, and not otherwise inconsistent with current settled case law. This subtitle is adopted for the sole purpose of

regulating the internal management of Hawaii correctional facilities. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

TITLE 17

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

SUBTITLE 2 CORRECTIONS DIVISION

CHAPTER 201

INMATE CUSTODY AND CONTROL

[Table of Contents Deleted]

SUBCHAPTER 1
THE CLASSIFICATION PROCESS

§17-201-1 *General provisions.* An inmate's or ward's classification determines where the inmate or ward is best situated within the corrections division. Classification is not dependent only upon isolated aspects of the individual, the individual's history and changing needs, the resources and facilities available to the corrections division, the other inmates or wards, the exigencies of the community and any other relevent [sic] factors. Classification is intended to be in the best interest of the individual, the state, and the community. In short, classification is a continuing evaluation of each individual to ensure that the inmate or ward is given the optimum placement within the corrections division. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-2 *Program committee.* (a) Where a program committee is deemed desirable, it shall be composed of at

least three members. A small facility may designate one person to act in the capacity as the program committee.

(b) When deemed desirable, the facility administrator may convene a program committee to assist with its recommendations. All classification decisions, including interstate transfers or increases in classification, may be accomplished without convening a program committee.

(c) An inmate or ward may be detained for a reasonable time pending a program committee review, if, in the judgment of the facility administrator, the detention is necessary:

(1) To protect life or limb;

(2) For the security or good government of the facility;

(3) To protect the community;

(4) For any other good reason.

(d) Because of the advisory nature of the program committee, the committee's review process, where deemed desirable, may be informal and non-adversarial. Considerations regarding notice, the appearance of the inmate or ward before the program committee, opportunity to be heard, presentation of evidence or testimony, availability of counsel substitute, or confrontation and cross-examination are entirely within the discretion of the program committee.

(e) The inmate or ward shall be apprised of the findings of the program committee:

(1) Upon completion of the review, the committee may take the matter under advisement and will render a recommendation.

The inmate or ward's silence may be a revelant [sic] factor.

(2) The inmate or ward shall be given a brief written summary of the committee's findings within a reasonable time after the review which findings shall briefly set forth the reasons for the action taken.

(3) The facility administrator may review the program committee's recommendation and:

(A) Affirm or reverse, in whole or part, the recommendation.

(B) Hold in abeyance any action the administrator believes jeopardizes the safety, security, or welfare of the staff.

(C) Make any decision regarding an inmate's or ward's placement or classification deemed appropriate. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-3 *Review.* Each inmate or ward has the right to seek administrative review of the decision through the grievance process. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

SUBCHAPTER 2
THE ADJUSTMENT PROCESS

§17-201-4 *General provisions.* The adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the

rights of others. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-5 *Rights, privileges, and responsibilities.* (a) The rights and privileges of all inmates and wards shall be as follows:

(1) You may expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel.

(2) You shall be informed of the rules, procedures, and schedules concerning the operation of the institution.

(3) You have the right to freedom of religious affiliation, and voluntary religious worship.

(4) You will be provided health care which includes nutritious meals, proper bedding and clothing, a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation, a regular exercise period, toilet articles, and medical and dental treatment.

(5) You may reasonably correspond and visit with family members, friends, and other persons according to the rules and schedules of the facility where there is no threat to security, order, or correctional programming.

(6) You may have access to the courts by correspondence on matters such as the legality of your conviction, pending criminal cases, or the conditions of your confinement.

(7) You may utilize reading material for educational purposes and for your own enjoyment.

(8) You have the right to participate in counseling, education, vocational training, employment, and other programs as far as resources are available and in keeping with your interests, needs, and abilities.

(b) The responsibilities of all inmates and wards shall be as follows:

(1) You have the responsibility to treat others respectfully, impartially, and fairly.

(2) You have the responsibility to know and abide by the rules, procedures, and schedules concerning the operation of the institution.

(3) You have the responsibility to recognize, respect, and not interfere with the rights of others.

(4) It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it.

(5) It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence.

(6) You have responsibility to present to the court honestly and fairly your petitions, questions, and problems.

(7) It is your responsibility to seek and utilize reading materials for personal benefit,

without depriving others of their equal right to the use of this material.

(8) You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-6 *Prohibited acts within institutions of the division; greatest misconduct category.* (a) Acts constituting misconduct of the greatest category shall be as follows:

(1) Sexual assault.

(2) Killing.

(3) Assaulting any person, with or without a dangerous instrument, causing bodily injury.

(4) The use of force on or threats to a correctional worker or the worker's family.

(5) Escape:

(A) From closed confinement, with or without threat of violence;

(B) From an open facility or program involving the use of violence or threat of violence.

(6) Setting a fire.

(7) Destroying, altering, or damaging government property or the property of another person resulting in damage of $1,000 or more, including irreplaceable documents.

(8) Adulteration of any food or drink which does or could result in serious bodily injury or death.

(9) Possession or introduction of an explosive or ammunition.

(10) Possession or introduction of any firearm, weapon, sharpened instrument, knife, or other dangerous instrument.

(11) Rioting.

(12) Encouraging others to riot.

(13) The use of force or violence resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.

(14) Any lesser and reasonably included offense of the acts in paragraph [sic] (1) to (13).

(15) Any other criminal act which the Hawaii Penal Code classifies as a class A felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (b) shall include one or more of the following:

(1) Disciplinary segregation up to sixty days.

(2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-7 *Prohibited acts; high misconduct category.* (a) Acts constituting misconduct of high category shall be as follows:

(1) Fighting with another person.

(2) Threatening another person, other than a correctional worker, with bodily harm, or with any offense against the other person or the other person's property.

(3) Extortion, blackmail, protection; demanding or receiving anything of value in return for protection against others, to avoid bodily harm, or under threat of informing.

(4) Assaulting any person without weapon or dangerous instrument.

(5) Escape from an open institution or program, conditional release center, or work release furlough which does not involve the use or threat of violence.

(6) Attempting or planning escape.

(7) Destroying, altering, or damaging government property or the property of another person resulting in damages between $500-$999.99.

(8) Tampering with or blocking any locking device.

(9) Adulteration of any food or drink which could or does result in bodily injury or sickness.

(10) Possession of an unauthorized tool.

(11) Possession or introduction or use of any narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff.

(12) Possession of any staff member's clothing or equipment.

(13) Encouraging or inciting others to refuse to work or to participate in work stoppage.

(14) The use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.

(15) Giving or offering any public official or staff member a bribe.

(16) Any lesser and reasonably included offense of paragraphs (1) to (15).

(17) Any other criminal act which the Hawaii Penal Code classifies as a class B felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to thirty days.

(2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-8 *Prohibited acts; moderate misconduct category.* (a) Acts constituting misconduct of moderate category shall be as follows:

(1) Engaging in sexual acts.

(2) Making sexual proposals or threats to another.

(3) Indecent exposure.

(4) Wearing a disguise or a mask.

(5) Destroying, altering, or damaging government property or the property of another person resulting in damages between $50-$499.99.

(6) Theft.

(7) Misuse of authorized medication.

(8) Possession of unauthorized money or currency.

(9) Loaning of property or anything of value for profit or increased return.

(10) Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.

(11) Refusing to obey an order of any staff member.

(12) Violating a condition of any community release or furlough program.

(13) Unexcused absence from work, or other authorized assignment.

(14) Failing to perform work as instructed by a staff member.

(15) Lying or providing false statements, information, or documents to a staff member, government official, or member of the public.

(16) Counterfeiting, or unauthorized reproduction of any document, article, or identification, money, security, or official paper.

(17) participating in an unauthorized meeting of gathering.

(18) Being in an unauthorized area.

(19) Failure to follow safety or sanitary rules.

(20) Using any equipment or machinery which is not specifically authorized.

(21) Using any equipment or machinery contrary to instructions or posted safety standards.

(22) Failing to stand count.

(23) Interfering with the taking of count.

(24) Making intoxicants or alcoholic beverage.

(25) Being intoxicated.

(26) Gambling.

(27) Preparing or conducting a gambling pool.

(28) Possession of gambling paraphernalia.

(29) Being unsanitary or untidy; failing to keep one's person and one's quarters in accordance with posted safety standards.

(30) Unauthorized contacts with the public or other inmates.

(31) Giving money or anything of value to or accepting money or anything of value

from an inmate or ward, a member of the inmate's or ward's family, or friend.

(32) Any lesser and reasonably included offense of paragraphs (1) to (31).

(33) Any other criminal act which the Hawaii Penal Code classifies as a class C felony and misdemeanor.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to fourteen days.

(2) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-9 *Prohibited acts; low moderate misconduct category:*

(a) Acts constituting misconduct of low moderate category shall be as follows:

(1) Destroying, altering, or damaging government property, or the property of another person resulting in damage less than $50.

(2) Possession of property belonging to another person.

(3) Possessing unauthorized clothing.

(4) Malingering, feigning an illness.

(5) Using abusive or obscene language to a staff member.

(6) Smoking where prohibited.

(7) Tattooing or self mutilation.

(8) Unauthorized use of mail or telephone.

(9) Correspondence or conduct with a visitor in violation of rules.

(10) Any lesser and reasonably included offense of paragraphs (1) to (9).

(11) Any other criminal act which the Hawaii Penal Code classifies as a petty misdemeanor.

(12) Harassment of employees.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to four hours in cell.

(2) Monetary restitution.

(3) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-10 *Prohibited acts; minor misconduct category* (a) Acts constituting misconduct of minor category shall be any criminal act which the Hawaii Penal Code classifies as a violation.

(b) Sanctions which may be imposed as punishment for acts in subsection (a) shall include one or more of the following:

(1) Loss of privileges (i.e., community recreation; commissary; snacks; cigarettes,

smoking; personal visits – no longer than fifteen days; personal correspondence; personal phone calls for not longer than fifteen days).

(2) Impound inmate's personal property.

(3) Extra duty.

(4) Reprimand.

(c) Attempting to commit any of the above acts, aiding another person to commit any of the above acts, and conspiring to commit any of the above acts shall be considered the same as a commission of the act itself. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-11 *Minor misconduct; adjustments.* (a) A minor rule violation is defined as that which poses no serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution or subjects the individual to the imposition of lesser penalties. Such misconduct may be punished by a staff member designated by the facility administrator who did not make the charge against the inmate or ward. The staff member shall inform the inmate or ward that the individual is accused of committing a minor infraction, to which the individual shall be given a brief opportunity to respond, to offer an explanation in defense, or otherwise show that the individual is not guilty of the alleged misconduct. The following sanctions may be imposed:

(1) Loss of privileges; e.g., community recreation; commissary; snacks, cigarettes; smoking; personal visits no longer than fifteen days; personal correspondence no longer than fifteen days; personal phone calls.

(2) Impound inmate's or ward's personal property.

(3) Extra duty.

(4) Reprimand.

(b) The officer shall prepare a brief written report to be given to and placed in the individual's file, indicating the infraction, the sanction, and the date or dates the sanction is to be or was carried out. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3).

§17-201-12 *Serious misconduct.* A serious rule violation is defined as that which poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and subjects the individual to the imposition of serious penalties such as segregation for longer than four hours. Such misconduct shall be punished through the adjustment committee pursuant to the procedures in sections 17-201-13 to 17-201-20 [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-13 *Adjustment committee.* The adjustment committee shall be normally composed of at least three members who are not actually biased against the inmate or ward. A small facility may designate one person to act in the capacity of the adjustment committee. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-14 *Pre-hearing detention.* An inmate or ward may be detained for a reasonable time pending an adjustment committee hearing if, in the judgment of the facility administrator, detention is necessary:

(1) To protect life or limb;

(2) For the security or good government of the facility;

(3) To protect the community;

(4) For any other good reason. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-15 *Pre-hearing investigation.* (a) A staff member may conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate or ward committed misconduct. If the staff member finds sufficient cause to believe that a rule violation has occurred, the adjudication procedures may be initiated. Additionally, the pre-hearing investigator may present the evidence against the inmate or ward to the adjustment committee.

(b) The implementation of a pre-hearing investigation shall be within the facility administrator's discretion. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-16 *Notice.* (a) The inmate or ward shall receive prior notice that an adjustment committee hearing will be held regarding the individual.

(b) Within a reasonable time, not less than twenty-four hours before the hearing the charged inmate or ward shall be served with written notice of the time and place of the adjustment committee hearing, what the specific charges are, including a brief notation of the facts. If the inmate or ward waives the twenty-four hour period, the waiver shall be reduced to writing and signed by the inmate or ward on the face of the notice.

(c) The inmate or ward or counsel substitute shall have the opportunity to review all relevant non-confidential reports or misconduct or a summary of the details thereof during the period between the notice and the hearing.

(d) The misconduct report or summary shall briefly contain the following:

(1) The specific rule violated;

(2) The facts supporting the charge;

(3) Any unusual inmate or ward behavior;

(4) Any staff or inmate or ward witnesses; the disposition of any physical evidence (e.g., weapons); and

(5) Any immediate action taken. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-17 *Hearing*. (a) The inmate or ward has a right to appear at the adjustment committee hearing, except where institutional safety or the good government of the facility would be jeopardized. If the individual is excluded from the hearing, reasons shall be given in writing. If the inmate or ward declines to attend the hearing, it shall be held regardless of the inmate's or ward's absence.

(b) The committee shall explain the reason for the hearing and the nature of the charge or charges against the inmate or ward. The inmate or ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

(1) A plea of guilty eliminates the need to consider other evidence against the inmate or ward who shall then be given an opportunity to explain the actions or offer evidence in mitigation.

(2) A plea of not guilty necessitates the consideration of evidence against the inmate or ward.

(c) The inmate or ward shall be advised of the right to remain silent, but that silence may be used as a permissible inference of guilt. An inmate or ward cannot, however, be compelled to testify against oneself without the granting of immunity and may not be required to waive the immunity.

(d) Formal rules of evidence shall not apply. The committee may rely on any form of evidence, documentary, or testimonial, that it believes is reliable.

(e) Confrontation and cross examination:

(1) The inmate or ward may be given the privilege to confront and cross examine adverse witnesses.

(2) The committee may deny confrontation and cross examination and identification of adverse witnesses if in its judgment such a confrontation would:

(A) Subject the witnesses to potential reprisal;

(B) Jeopardize the security or good government of the facility;

(C) Be unduly hazardous to the facility's safety or correctional goals; or

(D) Otherwise reasonably appear to be impractical or unwarranted.

(3) If confrontation and cross examination and identification of adverse witnesses are denied, the committee is encouraged to enter in the record of the proceeding and make available to the inmate or ward an explanation for the denial. Additionally, the inmate or ward may be given an oral or written summary of the confidential evidence against the individual and provided an opportunity to respond.

(f) The inmate or ward shall be given an opportunity to respond to evidence against the inmate or ward, explain the alleged misconduct, or offer evidence of mitigation.

(1) The inmate or ward should be permitted to call witnesses and present evidence of defense as long as it will not be unduly hazardous to institutional safety or correctional goals.

(2) The committee may deny the inmate's or ward's calling of certain witnesses or presentation of certain evidence, after being given an offer of proof as to the nature of the evidence, for reasons such as

(A) Irrelevance;

(B) Lack of necessity;

(C) The hazards presented in individual cases; or

(D) Any other justifiable reason.

In this regard, the committee may keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate or ward to be heard. The committee is encouraged to state the reason for the refusal.

(g) An inmate or ward shall be permitted to employ counsel substitute. A counsel substitute shall be a member of the facility staff who did not actively participate in the process by which the individual was brought before the committee or, in the facility administrator's discretion, a sufficiently competent inmate or ward designated by the facility staff. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-18 *Findings.* (a) The inmate or ward has a right to be apprised of the findings of the adjustment committee.

(b) Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of guilt shall be made where:

(1) The inmate or ward admits the violation or pleads guilty.

(2) The charge is supported by substantial evidence.

(c) The inmate or ward shall be given a brief written summary of the committee's findings which shall be

entered in the case file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason or reasons therefor must be set forth in the findings. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3).

§17-201-19 *Punishment.* (a) The adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited, provided that physical force may be employed for self defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate or ward pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the adjustment committee:

(1) Temporary loss of privileges.

(2) Segregation or confinement not longer than sixty days, provided that a longer period may be imposed with the expressed written approval of the corrections division administrator, and the committee shall review the inmate's or ward's confinement at least once every thirty days.

(3) Any other punishment deemed necessary by the adjustment committee.

(b) The committee may also refer the matter to the program committee for further action. A description of

the basic living levels of disciplinary confinement shall be as provided in subsections (c) to (h).

(c) The quarters used for segregation should be ventilated, adequately lighted, and maintained in a sanitary condition by the inmate or ward at all times. Normally, a segregated inmate or ward should be entitled to clothing, and bedding. If an inmate or ward is likely to destroy the clothing or bedding, injure oneself, or create a disturbance detrimental to others, or for other good reasons, materials may be removed from the cell until the condition which prompted removal subsides.

(d) Segregated inmates or wards shall be given an adequately nutritious diet.

(e) Segregated inmates or wards shall maintain an acceptable level of personal hygiene.

(f) Each segregated inmate or ward should be permitted indoor or outdoor exercise, unless security or institutional government dictates otherwise.

(g) Personal property will ordinarily be impounded, inventoried, and receipted.

(h) Normally, religious and legal materials are permitted. However, inmates or wards may be denied all reading and legal materials during temporary confinement for not longer than fifteen days. Access to legal materials shall be permitted if an inmate or ward demonstrates the need for the materials and for prompt access to the courts in preparation of a habeas corpus petition or other application for relief. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-20 *Review.* (a) Each inmate or ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of the day of receipt of the committee's decision.

(b) The facility administrator may also initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions. The administrator may demand [sic] any matter to the adjustment committee for further hearing or rehearing if the administrator believes it to be in the interest of justice. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

SUBCHAPTER 3
LEGAL REPRESENTATION

§17-201-21 *Inmate or ward legal counsel for adjustment process.* Inmates and wards shall not have the right to be represented by legal counsel before adjustment or program committees, or in proceedings related to interstate transfers or administrative segregation. Counsel may be allowed to participate in such proceedings in limited circumstances, but the granting of permission to participate shall be within the discretion of the facility administrator or a designated representative. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

SUBCHAPTER 4
ADMINISTRATIVE SEGREGATION AND TRANSFER

§17-201-22 *General provisions.* The facility administrator on a designated representative may administratively segregate or transfer, within or without the facility, any inmate or ward under any of the following circumstances:

(1) Whenever the facility administrator or a designated representative determines that an inmate or ward has committed or threatens to commit a serious infraction.

(2) Whenever the facility administrator or a designated representative, considering all the information available, including confidential or reliable hearsay sources, determines that there is reasonable cause to believe that the inmate or ward is a threat to:

(A) Life or limb;

(B) The security or good government of the facility;

(C) The community.

(3) Whenever any similarly justifiable reasons exist. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-23 *Protective custody.* (a) Admission to protective custody may be made only where there is reason to believe that such action is necessary or the inmate or ward consents, in writing, to such confinement. Protective custody is continued only as long as necessary except where the inmate or ward needs long term protection and the facts requiring the confinement are documented.

(b) Where an inmate or ward consents to confinement, the inmate or ward may be reassigned to the general population within two weeks of the request to be returned unless there is reason to believe that continued protective custody is necessary. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-24 *Procedures.* Administrative segregation is nonpunitive in nature and may be imposed for an indeterminate period until such time as the facility administrator or a designated representative determines that the reason for such confinement no longer exists. Within a reasonable period after the initial imposition of administrative segregation, the inmate or ward should be given a written summary of the reasons for administrative segregation and an opportunity to present evidence in defense before the administrator or designated representative when permitting the inmate or ward to do so will not be unduly hazardous to institutional safety or correctional goals. The facility administrator should review the inmate's or ward's confinement at least once every thirty days. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-25 *Review.* Each inmate or ward had the right to seek administrative review of the decision through the grievance process. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

SUBCHAPTER 5
ADMINISTRATIVE REMEDY OF COMPLAINTS

§17-201-26 *General provisions.* (a) Most complaints can be resolved quickly and efficiently through direct contact

with staff who are responsible in the particular area of the problem. This is the preferred course of action. Staff awareness of the importance of prompt attention and reply to these routine requests will minimize the use of formal complaint procedures.

(b) A viable complaint procedure will serve the inmates and wards, the administration, and the courts. It will provide the inmate and ward with a systematic procedure whereby issues raised relating to confinement will receive attention and a written, signed response within a short period of time from the facility, and from the corrections division, if appealed.

(c) Such a procedure assists the administration by providing an additional vehicle for internal solution of problems at the level having most direct contact with the inmate or ward. It also provides a means for continuous review of administrative decisions and policies. Further, it provides a written record in the event of subsequent judicial or administrative review. A viable administrative remedy procedure should reduce the volume of suits filed in court and will develop an undisputed record of facts which will enable the courts to make more speedy dispositions. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-27 *DSSH-3810 form (Inmate Complaint Grievance).* (a) If an inmate or ward cannot resolve a complaint through informal contact with staff, and wishes to file a formal complaint for administrative remedy, the individual should secure a copy of DSSH-3810 form and write the complaint in the space provided. The inmate or ward may secure assistance from staff or other inmates or

wards to complete the form. The inmate or ward should then give the completed form to a designated staff member, retaining a copy for the individual's own record.

(b) The complaint shall be filed within fourteen days from the date on which the basis of the complaint occurred unless it was not feasible to file within such period. Institution staff have up to fifteen days from receipt of the complaint, excluding weekends and holidays, to act upon the matter and provide a written response to the inmate or ward. When the complaint is of an emergency nature and threatens the inmate's or ward's immediate health or welfare, reply must be made as soon as possible, and normally within forty-eight hours from receipt of the complaint.

(c) When the proper course of action is determined, the response should be completed and signed. One copy should go to the inmate or ward, the original placed in the case file, and one copy to the corrections division administrator. Responses should be based upon facts which pertain specifically to the issue, and should deal only with the issue raised, and not include extraneous material.

(d) The complaint and grievance procedure shall follow in sequential steps as follows:

(1) Step 1: Inmate or ward to section supervisor or parole officer.

(2) Step 2: Inmate or ward to branch administrator.

(3) Step 3: Inmate or ward to division administrator. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-28 *Referral outside of the branch.* In the event that a complaint or grievance is not resolved at the branch level, it shall be referred to the administrator, corrections division, for action if so initiated by the inmate or ward. The decision of the corrections division administrator shall be final. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-29 *Referral to agencies or officials other than departmental.* An inmate or ward should, but is not required to first exhaust the administrative channels in this chapter in the quest of a resolution of the complaint or grievance before referring it to the ombudsman or other authorized officials. However, inmates and wards are advised that courts frequently require evidence that administrative remedies have been exhausted before granting relief through such means as habeas corpus. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

Hawaii Revised Statutes (1985 & Supp. 1992) provide in relevant part that:

* * *

§353-1 Definitions; director may delegate powers. As used in this chapter unless the context clearly indicates otherwise:

"Department" means the department of public safety.

"Director" means the director of public safety; provided that the signing or approval of vouchers and other routine matters may be delegated by the director to any authorized subordinate. [L 1987, c 338, pt of §3; am L 1989, c 211, §8]

* * *

§353-6 Establishment of community correctional centers. There shall be a community correctional center for each county under the direction and administration of the director. Any community correctional center may be integrated and operated concurrently with any other correctional facility or facilities. Each center shall:

(1) Provide residential detention for persons awaiting judicial disposition who have not been conditionally released;

(2) Provide residential custody and correctional care for committed misdemeanants and for felons committed to indeterminate sentences;

(3) Provide for committed persons, correctional services, including but not limited to, social and psychiatric-psychological evaluation, employment, counseling, social

inventory, correctional programming, medical and dental services, and sex abuse education and treatment programs for persons convicted of sexual offenses or who are otherwise in need of these programs;

(4) Provide recreational, educational, and occupational training, and social adjustment programs for committed persons;

(5) Provide referrals to community educational, vocational training, employment, and work study programs; and aftercare, supervisory, and counseling services for persons released from centers. [L 1987, c 338, pt of §3; am L 1989, c 350, §1]

§353-7 High security correctional facility. (a) The director shall maintain a high security correctional facility for the residential care, correctional services, and control of high custodial risk convicted felons or the temporary detention of high custodial risk persons awaiting trial. The high security correctional facility may be integrated and operated concurrently with any other correctional facility or facilities.

(b) The Facility shall:

(1) Provide extensive control and correctional programs for categories of persons who cannot be held or treated in other correctional facilities including, but not limited to:

(A) Individuals committed because of serious predatory or violent crimes against the person;

(B) Intractable recidivists;

(C) Persons characterized by varying degrees of personality disorders;

(D) Recidivists identified with organized crime; and

(E) Violent and dangerously deviant persons;

(2) Provide correctional services including, but not limited to, psychiatric and psychological evaluation, social inventory, correctional programming, and medical and dental services; and

(3) Provide recreational, educational, occupational training, and social adjustment programs. [L 1987, c 338, pt of §3; am L 1989, c 41, §1]

§353-8 Conditional release centers for committed persons. (a) The director may establish and operate facilities to be known as conditional release centers, either operated separately, or as part of community correctional centers.

(b) The purpose of such facilities is to provide housing, meals, supervision, guidance, furloughs, and other correctional programs for persons committed to the department of public safety and to give committed persons, in selected cases, a chance to begin adjustment to life in a free society and to serve as a test of an individual's fitness for release on parole.

(c) The department shall notify the county prosecutors and police chiefs whenever a person committed for an offense against the person as described in chapter 707, or any convicted felon, is admitted to a work furlough, conditional release, or similar program. Notification shall

be transmitted in writing no later than thirty days prior to the commencement of the program and shall list the conditions pertaining thereto.

(d) Additionally, whenever the department admits a committed person who has been convicted of an offense against the person as described in chapter 707, or of an attempt to commit such an offense, to a work furlough program, conditional release program, or other similar programs, it shall give written notice to each victim of the offense, who has made written request for such notice, of the admission of the committed person to the program. Notice shall be given to the victim at the address given on the request for notice or such address as may be provided to the department by the victim from time to time. Neither the failure of any state officer or employee to carry out the requirements of this section nor compliance with it shall subject the State or the officer or employee to liability in any civil action. However, such failure may provide a basis for such disciplinary action as may be deemed appropriate by competent authority. [L 1987, c 338, pt of §3; am L 1989, c 211, §8; am L 1992, c 64, §1]

§353-9 Establishment of temporary correctional facilities. The director, with the prior approval of the governor, may establish, from time to time, temporary correctional facilities, if required in conjunction with projects or specialized service authorized by law. The temporary facilities shall be discontinued upon termination of the project. [L. 1987, c 338, pt of §3]

* * *

§353-64 Prisoners paroled. Any prisoner confined in any state prison in execution of any sentence imposed

upon the prisoner, except in cases where the penalty of life imprisonment not subject to parole has been imposed, shall be subject to parole in manner and form as set forth in this part. [L 1917, c 103, §1; RL 1925, §1560; am L 1931, c 126, §1; RL 1935, §6435; RL 1945, §3958; am L 1955. c 239, §1; RL 1955, §83-63; HRS §353-64; am imp L 1984, c 90, §1]

* * *

[In 1988, the proceeding section was amended to read;]

§353-64 Committed persons paroled. Any committed person confined in any state correctional facility in execution of any sentence imposed upon the committed person, except in cases where the penalty of life imprisonment not subject to parole has been imposed, shall be subject to parole in manner and form as set forth in this part; provided that to be eligible for parole, the committed person, if the person is determined by the department to be suitable for participation, must have been a participant in an academic, vocational education, or prison industry program authorized by the department and must have been involved in or completed the program to the satisfaction of the department; and provided further that this precondition for parole shall not apply if the committed person is in a correctional facility where academic, vocational education, and prison industry programs or facilities are not available. [L 1917, c 103, §1; RL 1925, §1560; am L 1931, c 126, §1; RL 1935, §6435; RL 1945, §3958; am L 1955, c 239, §1; RL 1955, §83-63; HRS §533-64; am imp L 1984, c 90, §1; am L 1988, c 147, §1]

§353-65 Paroles; rules and regulations. The Hawaii paroling authority may establish rules and regulations, with the approval of the governor and the director of social services not inconsistent with this part, under which any prisoner may be paroled but shall remain, while on parole, in the legal custody and under the control of the paroling authority, and be subject, at any time until the expiration of the term for which the prisoner was sentenced, to be taken back within the enclosure of the prison. The rules and regulations shall have the force and effect of law. Full power, subject to this part, to enforce the rules and regulations, to grant, and to revoke paroles is conferred upon the paroling authority. The power to retake and reimprison a paroled prisoner is conferred upon the administrative secretary, who may issue a warrant authorizing all of the officers named therein to arrest and return to actual custody any paroled prisoner. The superintendent of Hawaii state prison, the chief of police of each county and all police officers of the State or of any county, and all prison officers shall execute any such order in like manner as ordinary criminal process.

If any prisoner so paroled leaves the State without permission from the paroling authority, the prisoner shall be deemed to be an escaped prisoner, and may be arrested as such. [L 1917, c 103, §2; RL 1925, §1561; am L 1931, c 126, §2; am L 1932 1st, c 17, §8; RL 1935, §6454; am L 1939, c 203, pt of §6; RL 1945, §3959, RL 1955, §83-64; am L 1957, c 308, §1; am L 1963, c 34, §§1, 2; am L 1965, c 96, §57; HRS §353-65; am L 1969, c 208, §1; am L 1976, c 92, pt of §8; am imp L 1984, c 90, §1]

* * *

§353-68 Parole, how initiated and granted. (a) Paroles may be granted by the Hawaii paroling authority at any time after the prisoner has served the minimum term of imprisonment fixed according to law; provided that where a fine has also been imposed, which has not been paid, and if the prisoner has been imprisoned for at least thirty days, the paroling authority upon being satisfied that the prisoner has petitioned the court for revocation of all or part of such fine pursuant to section 706-645, may nevertheless parole the prisoner without payment of the fine, either with or without the condition, subject to determination by the court under section 706-645, that while on such parole the prisoner make payment of the fine as the paroling authority deems proper under the circumstances. The proceedings to obtain parole may be initiated by the written recommendation of the superintendent to the paroling authority or may be initiated by the paroling authority without any such recommendation.

(b) The governor shall have like power to revoke the parole of any prisoner. The written authority of the governor shall likewise be sufficient to authorize any police officer to retake and return the prisoner to prison. The governor's written order revoking the parole shall have the same force and effect and be executed in like manner as the order of the chairman of the paroling authority.

(c) The paroling authority shall act by majority of all its members in respect of all proceedings touching the

parole of prisoners. [L 1931, c 126, §4; RL 1935, §6456; am L 1939, c 203, pt of §6; am L 1943, c 207, §2; RL 1945,

* * *

§353-69 Parole when. No parole shall be granted unless it appears to the Hawaii paroling authority that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that the prisoner's release is not incompatible with the welfare and safety of society. [L 1917, c 103, §4; RL 1925, §1563; am L 1931, c 126, §5; RL 1935, §6457; RL 1945, §3962; RL 1955, §83-67; HRS §353-69; am L 1976, c 92, pt of §8; am imp L 1984, c 90, §1]

§353-70 Final discharge. Whenever, it its opinion, any paroled prisoner has given such evidence as is deemed reliable and trustworthy that the paroled prisoner will remain at liberty without violating the law and that the paroled prisoner's final release is not incompatible with the welfare of society, the Hawaii paroling authority may grant the prisoner a written discharge from further liability under the prisoner's sentence.

Any parole prisoner who has been on parole for at lease five years shall be brought before the paroling authority for purposes of consideration for final discharge and complete pardon. In the event the prisoner is not granted a final discharge and full pardon, the paroled prisoner shall be brought before the paroling authority for the aforementioned purposes annually thereafter.

Any person, who, while on parole, enters the military service of the United States, may, upon the person's honorable discharge therefrom, petition the paroling authority for a final discharge, and the paroling authority may consider the honorable discharge as grounds for granting a final discharge from parole and recommending to the governor a full pardon. [L 1917, c 103, §7; RL 1925, §1566; am L 1931, c 126, §7; RL 1945, §3963; am L 1949, c 2, §1; RL 1955, §83-68; am L 1957, c 308, §4; am L 1963, c 149, §1; HRS §353-70; am L 1976, c 92, pt of §8; am imp L 1984, c 90, §1]

* * *

HAWAII ADMINISTRATIVE RULES

TITLE 23

DEPARTMENT OF PUBLIC SAFETY

SUBTITLE 5

HAWAII PAROLING AUTHORITY

CHAPTER 700

* * *

SUBCHAPTER 1

Hawaii Paroling Authority

23-700-1 Definitions. As used in this chapter, unless the context otherwise requires:

"Authority" means the Hawaii Paroling Authority.

"Administrative review" is a review by the Authority of an inmate's status and adjustment without the presence of the inmate.

"Administrative Secretary" means the Parole and Pardon Administrator or the Administrator's designee.

"Chairperson of the Authority" means the Chairperson of the Authority or the Chairperson's designee.

"Formal decisions of the Authority" means the fixing or reduction of a minimum term of imprisonment, a decision on a request for reduction of minimum term of imprisonment, a pardon or commutation recommendation and granting, denying, revoking, suspending or reinstating parole.

"Hearing" means a formal Authority meeting with an inmate or parolee, and does not include or mean executive sessions or decision-making sessions by the Authority.

"Inmate" means a person committed to the Department of Public Safety with an indeterminate or extended term of imprisonment.

"Interview" is an informal meeting with one or more members of the Authority and an inmate.

"Offense against the person" means any of the offenses described in Chapter 787 of Hawaii Revised Statutes and includes any attempt to commit any of those offenses.

"Parolee" means a person who has been paroled by the Authority who has not served the maximum term of imprisonment, has not been discharged from the sentence, or had parole revoked by the Authority.

"Surviving immediate family member" means a person who is a surviving grandparent, parent, sibling, spouse, child or legal guardian of a deceased victim.

"Victim" means the person who was the victim of the offense against the person for which the inmate or parolee was convicted.

[Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-62, 353-65)

23-700-2 General. (a) The parole system is to protect the community. Protection of the community and reintegration of an inmate into the community is accomplished by fixing an appropriate minimum term of

imprisonment, granted or denying parole, revoking parole, and supervising the inmate on parole.

(b) The Authority consists of three persons; one full-time and two part-time members, appointed by the Governor and confirmed by the State Senate. The Authority is an independent quasi-judicial body which, for administrative purposes only, is attached to the Department of Public Safety. Decisions of the Authority are not subject to the approval of the Department of Public Safety.

Formal decisions of the Authority shall not be conclusive and final unless at least two members are in agreement. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-62, 353-65)

* * *

[SUBCHAPTER 2 DELETED]

* * *

SUBCHAPTER 3

PAROLE

23-700-31 Consideration for parole. (a) The Authority shall afford an inmate a parole hearing no later than thirty days prior to the expiration of an inmate's longest minimum term of imprisonment, and on the basis of the hearing grant or deny parole prior to the expiration of the longest minimum term of imprisonment.

(b) When parole is denied, another parole hearing shall be scheduled to take place within twelve months of the last parole hearing date; provided the inmate does not appear before the Authority within the twelve months for

fixing of minimum term of imprisonment for another offense. The Authority shall set a parole hearing date at that time.

(c) When parole is granted, it may be rescinded prior to the release of the inmate on parole when the Authority receives new information on the inmate that would be the basis to deny parole. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-68, 706-670)

23-700-32 Parole consideration procedures, (a) The Authority shall serve an inmate with written notice of a parole hearing. The notice shall be served on the inmate and inmate's attorney at least seven days prior to the parole hearing.

(b) The Authority shall inform the inmate in writing of the inmate's right to:

(1) Consult with any persons the inmate reasonably desires;

(2) Representation and assistance by counsel at the parole hearing;

(3) Have counsel appointed to represent and assist inmate if the inmate so requests and cannot afford to retain counsel;

(4) Be heard and to present any relevant information;

(5) Assistance from a parole officer in preparing a parole plan and in securing information for presentation to the Authority

(c) The parole plan shall include information on the life the inmate intends to lead, how the needs of the

inmate will be addressed, where and with whom the inmate will reside, and occupation or employment. Responsibility for the development and validity of the parole plan rests with the inmate.

(d) The State shall have the right to be represented at the hearing by the prosecuting attorney who may present written testimony and make oral comments and the Authority shall consider such testimony and comments in reaching its decision. The Authority shall notify the appropriate prosecuting attorney of the hearing at the time the prisoner is given notice of the hearing

(e) The Authority shall prepare and provide the Department of Public Safety, the inmate and inmate's attorney with a written statement of its decision and order.

(f) When parole is granted, the Authority shall set the minimum length of parole term the inmate is required to serve. When parole is denied, the decision shall state the reasons for denial and the next parole hearing date.

(g) The Authority shall make a mechanical or verbatim stenographic record of each parole hearing. No record of subsequent discussions and deliberations need be made. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-68, 706-670)

23-700-33 Information considered and criteria utilized in parole consideration. Parole shall not be granted unless it appears to the Authority that there is a reasonable probability that the inmate concerned will live and remain at liberty without violating the law and that the inmate's release is not incompatible with the welfare and

safety of society. Parole is not a right of an inmate or parolee. parole may be denied to an inmate when the Authority finds:

(a) The inmate does not have a viable parole plan;

(b) The inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record;

(c) The inmate has refused to participate in recommended prison programs;

(d) The inmate's behavior in prison is a continuation of the behavior that led to the inmate's imprisonment;

(e) The inmate has a pending prison misconduct;

(f) The inmate does not have the ability or commitment to comply with conditions of parole;

(g) The inmate has pending criminal charges which arose from inmate's current incarceration or last parole;

(h) The inmate has a parole plan for a state that has not accepted the inmate for supervision; or

(i) The inmate has expressed little or no interest in parole. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-67, 353-69, 706-670)

23-700-34 Cash and clothing furnished paroled or discharged prisoners. Upon parole or discharge from the maximum prison sentence, an inmate, who has been committed or sentenced to one year or more, shall be furnished with funds and clothing as authorized by statute.

[Eff AUG 22 1992] (Auth: HRS 353-63, 353-65) (Imp: HRS 353-65, 353-67, 353-69, 706-670)

23-700-35 Actual release on parole. (a) Release on parole shall be conditioned on an inmate's written acceptance of the "Terms and Conditions of Parole" attached to these rules and regulations, and any special terms and conditions the Authority finds necessary to protect the welfare and safety of society and guard against future law violations.

(b) Parole may be deferred by the any member of the Authority should any significant and new information come to the attention of the Authority between the time of the decision to grant parole and the release date.

(c) When parole is deferred, the Authority shall notify the inmate in writing of the reason for deferral and afford the inmate a hearing.

(d) The Authority shall give written notice of the parole or release from parole of an inmate or parolee to each victim who has submitted a written request for notice or to a surviving immediate family member who has submitted a written request for notice.

(e) The Authority shall provide written notice to the victim or surviving immediate family members at the address given on the written request for notice or such other address as may be provided by the victim or surviving immediate family member, not less than ten days prior to parole or final unconditional release. However, the Authority, in its discretion, may instead give written notice to the witness or victim counselor programs in the prosecuting attorney's office in the appropriate county.

[Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-66, 353-69, 706-670, 706-670.5)

23-700-36 Procedure following a deferral of parole. (a) When parole is deferred, a hearing shall be held by the last day of the month following the month of deferral.

(b) At the hearing following deferral of parole, the inmate shall be given the opportunity to be heard, present information, and subject to security considerations, examine written materials.

(c) The inmate shall be given at least seven calendar days written notice of this hearing.

(d) The Authority shall inform the inmate of the inmate's right to consult with any persons the inmate reasonably desires, including the inmate's own counsel.

(e) The Authority shall inform the inmate of the inmate's right to be represented and assisted by legal counsel at the hearing.

(f) The Authority shall inform the inmate that counsel will be appointed to represent and assist the inmate if the inmate requests and states the inmate cannot afford to retain counsel.

(g) The Authority shall provide the Department of Public Safety, inmate and inmate's attorney with a written statement of its decision and order rescinding or granting parole.

(h) The written statement shall include the Authority's reason for its decision. [Efff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-68, 706-670)

23-700-37 Computation of maximum parole time. (a) If a parolee's parole is revoked, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the Authority but shall not exceed in aggregate length the unserved balance of the maximum term of imprisonment.

(b) Time spent in detention relative to a specific charge prior to commitment by the courts upon conviction of an offense shall be considered pre-confinement credits. Pre-confinement credits shall be deducted from the minimum and maximum terms. This standard applies only to those offenses committed since January 1, 1973. For offenses committed prior to January 1, 1973, pre-confinement credits apply only to the minimum terms.

(c) When a parolee's whereabout is unknown or the parolee leaves the State without permission, the Authority may suspend that person's parole term until the parolee is in the custody of a law enforcement agency to be returned to the custody of the Department of Public Safety. That period of suspension shall be added to the parolee's aggregate parole term. [Eff AUG 22 1992] (Auth: HRS 353-63, 353-65) (Imp: HRS 353-65, 353-66, 706-670)

HALAWA CORRECTIONAL FACILITY
Special Needs Facility

MAXIMUM CUSTODY INMATE GUIDELINES

MAX I

Inmates are subject to all State of Hawaii laws, Department of Public Safety policies, and Halawa Correctional Facility (HCF) policies and procedures. Any deviation from these guidelines may be subject to a program hearing, disciplinary action and/or criminal charges.

All rules of these guidelines shall be considered a *direct order.*

The following are the guidelines for inmates programmed to the MAX I Custody Unit of HCF.

CONDUCT/BEHAVIOR

1. Inmates will not govern or order another inmate(s).

2. At no time will an inmate yell, whistle, etc., at any staff member. Inmates shall not use abusive or obscene language towards any staff member or other inmate.

3. All inmates are expected to display a respectful attitude and demeanor towards staff and visitors to the facility.

4. All inmates will obey all written and verbal orders given to them by staff.

SELF-REPRESENTATION

5. There will be no group representation. All inmates will be self-represented unless specifically authorized by the Warden.

FACILITY MOVEMENTS

6. Only one inmate at a time shall be allowed out of his cell when authorized or permitted. While out of his cell, he shall go directly to and from his authorized destination and not loiter, visit with other inmates, or in any way delay his return to his cell.

7. Whenever an inmate is authorized to be moved out of the unit, that inmate shall be leg-ironed and waist-chained at all times during his absence.

8. All inmates in the unit shall be strip-searched upon leaving and returning to the unit.

9. Inmates must be properly dressed in HCF uniform and footwear must be worn at all times when leaving the unit, except for legitimate reasons. (Exceptions: Uniforms do not have to be worn at recreation and upon being escorted to court jury trials.) Inmates will be dressed in uniform or shorts within the unit.

10. All unit doors shall remain locked at all times unless authorized or permitted to be opened by staff.

11. During medication, the inmate will walk directly to the gate from his assigned cell. Upon accepting medication, the inmate will immediately swallow it and allow the nurse to check his mouth.

12. Inmates will be appropriately dressed when out of their cells except when going to the shower. Pants or athletic shorts and footwear are considered appropriate.

SPECIAL HOLDING STANDARDS

13. Blankets, sheets, pillows, pillow cases, laundry bags, and mattresses shall be kept on the inmate's respective bed.

14. Any personal property left in the central and shower areas will be confiscated. A write-up will be issued.

15. Inmates are not authorized in another inmate's cell and inmates are not to allow the other inmates into their cells.

16. Only one inmate shall shower at a time. Showers are not permitted during meals or headcount. An inmate, when going to and from the shower, must be covered with at least a towel unless he is behind the shower curtain and out of view. Inmates are not allowed to soap themselves or dry off outside of the shower stall.

17. There will be no exercising in the inmates' assigned cells. Exercises prescribed for medical reasons will be done at recreation.

18. No items shall be given by an inmate to an ACO to be passed to another inmate.

19. No defacing of walls, windows, fixtures, and equipment. Nothing may be hung on the cell walls. No pasting of pictures, etc. on the beds.

20. There will be no obstruction to the see-through glass (windows) on the cell, windows, light fixtures, and vents.

21. Stringing of clothes lines shall not be permitted.

22. All dayroom lights and all cell lights will be turned off at 1000 hours. Lockdown will be completed by 1000 hours. All lights will be turned back on at 0530 hours. Security lights will remain on all night.

23. Inmates are responsible for keeping their cells clean, orderly, and ready for inspection at all times.

24. Inmates shall not pass any items under their cell door to another inmate under any circumstances. Inmates will not pass items during movements.

25. Cardboard boxes, plastic containers, plastic bags, glass containers, cans, or any implement of storage shall not be permitted or stored in an inmate's cell. (Exception: Dentist/Unit Team approved containers for dentures.)

26. Inmates shall not save or store any seed and chip packages, candy wrappers, etc.

27. One religious medal with chain and one wedding band may be permitted upon inspection for suitability by the Unit Team.

28. Instruments of music shall not be permitted in the cell.

29. No inmate shall have money in his possession. All money will be considered contraband and subject to confiscation. There will be no transferring of money from one HCF inmate account to another.

30. The toilet shall not be used as a disposal of discarded items. No item authorized for retention shall be flushed through the toilet except toilet paper.

31. Horseplaying (pushing, shoving, etc.) is not allowed at any time.

32. Inmates shall not use abusive or obscene language towards any staff member. Inmates shall not talk or make noise while staff members and visitors are in the inmate housing area.

33. Inmates will not make unreasonable noise or harass others. They will not use abusive or obscene language or crude gestures to others which might provoke a response.

34. Sweatshirts are to be worn only in the cells or in the recreation yard.

35. Television privileges shall not be permitted.

36. Radios, tape recorders, and all electronic entertaining devices shall not be permitted for personal retention.

37. Inmates shall not yell, shout or cause a disturbance of any type unless an emergency situation exists.

38. Inmates shall not pound, shake, rattle or kick their cell doors.

39. Inmates shall not deliberately flood their cell.

40. Recreational games shall not be permitted for use or retention. Inmates shall not make or have any type of recreational games (i.e., chess or checker boards and pieces, playing cards of any sort, crossword puzzles, hangman, etc.).

41. Inmates shall not be in possession of carbon paper or use carbon paper other than for authorized purposes. Inmates shall not rip, tear or remove carbon paper from any documents.

MEALS

42. All meals will be consumed inside the cell upon distribution of food trays by the ACOS.

43. After each meal, all trays will be put in an orderly fashion outside of the cell. *No food will be stored in the cell.*

AUTHORIZED ITEMS FOR RETENTION

Except for the items listed below, nothing else is permitted for retention by the inmate in his cell unless specifically authorized by the Unit Team. All excess personal items will be kept in the inmate's property storage area for no more than 30 days. Arrangements by the inmate shall be made for it to be sent out from the facility (via family, friends or mail). Excess property may be picked up on Mondays through Fridays, except on holidays, from 0800 hours to 1530 hours. Property held in excess of 30 days shall be donated to charity.

Authorized items for retention, as herein listed and reflected in the Inmate Inventory List of Authorized Inmate Property, shall not be altered or used other than the way they were intended to be used. All store order items shall be purchased on a trade-for-trade basis.

All hygiene items must be obtained via the inside store order or facility issue.

44. One tube toothpaste and one toothbrush.
45. One lotion.
46. Three bars of soap.
47. One deodorant, solid stick or roll-on.
48. One plastic bottle of shampoo or shampoo/conditioner.
49. One comb (HCF approved).
50. One roll toilet paper.
51. Dental floss (50 yards).

52. Any medical items for retention must have prior medical approval and proper labeling and identification.
53. Perishable inmate store-bought items: Limits as set on the store order forms.
54. Two towels and two washcloths.
55. One mattress.
56. One blanket.
57. Two sheets.
58. One pillow.
59. One pillow case.
60. One sweatshirt (through inmate store order).
61. One pair slippers (HCF issued or through inside store order only).
62. One pair of athletic shoes (through inmate store order).
63. Five issued white t-shirts, six personal t-shirts (white, no pockets); no tank tops.
64. Five issued white boxer undershorts; six personal undershorts-boxer/brief/white.
65. Six personal pairs of tube socks.
66. Three athletic shorts (solid color, no pockets, no drawstrings, no white or off-white.
67. One issued laundry bag without a string.
68. Two issued uniform pants (orange). Two issued uniform shirts (orange).

69. Manila envelopes may be purchased for immediate use by inmates with pending legal cases upon approval of the Unit Manager. Indigent inmates with pending legal cases may request that the cost of the envelopes be debited to their account.

70. One pencil. (Pens for legal work must be requested from staff. When approved, pens shall be provided according to a reasonable schedule and commensurate with the inmate's legal needs.)

71. Indigent inmates may request four (4) sheets of writing paper from staff.

72. One tablet of writing paper (with or without lines, not to exceed 8-1/2" x 11" – issued through inside store order only). Indigent inmates with pending legal matters may request that the cost of the tablet be debited to their account. Cardboard will be removed.

73. One package of 75 letter or legal size envelopes (through inmate store order).

74. Stamps (through inmate store order) maximum of two books (40 stamps).

75. Twelve photographs (not to exceed 4" by 6").

76. Five incoming correspondence (letters/greeting cards).

77. One issued pocket-size calendar.

78. One Bible (Koran, Toran, Book of Mormon, etc.).

79. One *Inmate Handbook*.

80. One "Max I Inmate Guidelines."

81. Ten reading materials – i.e., magazines, library books, educational materials, legal materials. (Inmates approved by the Unit Team to participate in educational, recreational and religious program activities, and/or have pending legal cases, may keep in their possession a *maximum* of 10 books.).

82. Daily newspaper – no more than three daily newspapers may be kept in cell at any given time. Proper disposal of the newspapers is required.

83. One wedding ring (registered).

84. One neck chain with religious medallion (registered).

Authorized items for retention, as herein listed, shall not be altered or used other than the way they were intended to be used. All store ordered items shall be purchased on a trade-for-trade basis.

With the approval of the Unit Team, inmates may subscribe to a maximum of four (4) publications and to the daily newspaper in accordance with established procedures.

Court clothes and funeral/parole attire (1 set which may include: 1 pair of trousers, 1 dress shirt, 1 pair of dress shoes, and 1 pair of dress socks) will be accepted with prior approval. The set may be exchanged should there be valid reasons to do so. Within two (2) weeks after the completion of the event, inmate makes arrangements to have his clothes sent out of the facility or the clothes will be donated to charity unless otherwise authorized.

All HCF issued property is the inmate's responsibility. Any damage, loss, etc., to issued property may result in a misconduct report being filed against the inmate assigned the property which may include his having to pay for the property.

PROHIBITED ITEMS

85. Inmates found in violation of any stipulations as reflected in the Inmate Inventory List of Authorized Inmate Property shall be subject to an Incident Report and/or possible misconduct.

86. Anything not specifically authorized for possession, conveyance or introduction onto the HCF compound by the Warden shall be considered contraband. Inmates violating this section shall be subject to appropriate disciplinary sanctions which may include criminal charges.

87. Inmates are not allowed to hoard personal or perishable items and are authorized to keep in his possession only the maximum limit of each item.

COMMUNICATION

88. All requests will be in writing except for emergency situations.

89. The staff shall be immediately informed of any medical emergency. All medical appointments will be scheduled through the facility nurse by submitting a request. No inmate shall possess any medication

except as authorized by the Medical Unit with approval of Administration.

90. ACOs will accept requests from the inmates once daily in the morning (0700 hours).

91. Inmates shall communicate in the English language only including telephone calls, visits and letters.

Exception: A written request must be submitted and approved by the Unit Team for an inmate to speak a foreign language to a non-English speaking family member.

VISITS

92. *Official Visits* shall be permitted at any reasonable hour in accordance with applicable department and facility policies. Official visitors are encouraged to make prior appointments with the facility.

93. *Personal Visits* are a privilege that shall be limited to one (1) one-hour non-contact visit per week. Visitors must have prior approval via the inmate visitation cards. Requests for visits must be made in writing by the Maximum Custody inmate to the caseworker no less than three (3) working days prior to the date of the proposed visit. The visit must be approved by the Unit Team before it may be scheduled. Visits will be limited to immediate family per facility procedure.

Denial of such visits will be for cause. The reasons for denial will be furnished in

writing to the inmate. Where confidential information is involved, a general summary will be for the safety, security, and good government of the facility only. The prospective visitor's criminal record, if any, will be considered.

Non-immediate family and friend visitors will be permitted to visit only one Maximum Custody inmate.

94. *Special Personal Visits* will be limited to those person(s) living off-island only. If they are unable to visit during regular visits as scheduled, they may request ahead of time for a special visit which will be for one-hour during the weekdays and during business hours. Roundtrip airline tickets must be presented as verification of off-island status and the actual dates of stay on Oahu.

Special visits shall be limited to no more than three (3) visitors and shall be scheduled during the week unless otherwise authorized by the Unit Team and the Warden.

A request for special visit shall be submitted on an inmate request form stating the following information: complete name(s) of visitor(s); their relationship; date of birth or Social Security Number; and length of stay on Oahu.

Requests for special visits are to be submitted a minimum of five (5) working days before the proposed visit is to take place.

CORRESPONDENCE

95. Incoming or outgoing mail to and from inmates will be inspected and read. Privileged mail, as described by the *Inmate Handbook*, should normally be inspected for contraband in the presence of the inmate. Outgoing privileged mail will be stamped by the ACO. Incoming personal mail maybe withheld from the inmate for up to 15 days and outgoing personal mail may be restricted for up to 15 days in accordance with the provisions of the *inmate Handbook* regarding punishment sanctions.

OUTGOING MAIL

96. The name and address of the inmate must be on the front upper left hand corner of the envelope. The name and address, including zip code, of the recipient must be on the front of the envelope in the center.

97. Proper postage is to be affixed on the upper right hand corner of the envelope. If the postage is incorrect, the mail will be returned to the inmate with a note showing the amount of postage required before the mail is sent out.

98. All outgoing mail will be picked up from the quads daily at lockdown, 2130 hours.

99. all outgoing letters must have the inmate's commitment name and return address on the envelopes.

INCOMING MAIL

100. The ONLY authorized items inmates may receive in the mail are letters, signed post-cards and greeting cards, photographs, money orders/cashiers checks, xerox copies, newspaper clippings, religious material direct from a publisher or church, and all approved subscriptions to maga-zines/books. ALL other items such as cat-alogs, stamps, brochures, bookmarks, stickers (both loose and pasted on letters or envelopes), blank stationary [sic] and envelopes are considered unauthorized items. Any other item received requires a case manager's approval prior to being sent to the inmate.

101. Checks and money orders must be made payable to HALAWA CORRECTIONAL FACILITY with the inmate's name indi-cated.

102. Incoming inmate mail must have the sender's name and return address or it will be considered unauthorized personal property. Inmates will NOT have access to unauthorized property and will make arrangements to dispose of this property within thirty (30) days. After thirty (30) days, the property clerks have been advised to dispose of the unauthorized property according to HCF guidelines.

103. There is no restriction on the amount of *incoming personal letters* but inmates are allowed to keep only five (5) personal let-ters and twelve (12) photographs in their possession.

104. Incoming and outgoing greeting cards are not to exceed 8½" by 11". Cards larger than this will be considered unauthorized property.

105. All incoming inmate mail will be required to show the inmate's commitment name and housing assignment as part of the address.

106. Each inmate will be responsible for informing their families, friends, and acquaintances of these stipulations.

107. Correspondence between inmates in other correctional facilities may be allowed with prior approval of both facilities' wardens.

108. Inmates will be responsible for the pur-chase of writing materials through the inmate store order.

LIBRARY

109. Recreational library services will be pro-vided once a week per schedule. Law Library appointments will be scheduled by the librarian via a request.

110. Inmates will return all library books prior to their transfer to other facilities. Inmates will not give their library books to other inmates and missing books may be deb-ited to their account. No library books will be placed in personal property. Any books left in the common area will be confis-cated and given to the librarian.

LAUNDRY

111. Laundry services are provided twice a week as scheduled.

112. Blankets will be cleaned and mattresses will be sanitized at least once a month as scheduled.

113. All clothing will be marked with assigned laundry numbers to assure proper return after laundry days.

TELEPHONE PRIVILEGES

114. *Personal telephone calls* – Inmate personal telephone calls will be allowed in accordance with the prescribed scheduling. Incoming personal telephone calls are not permitted. Personal calls will be collect calls with the debt placed on the bill of the receiving party. No pens, pencils or writing material such as note paper, etc., will be allowed out of the quad during personal phone calls. Wonderphone/smart phone calls are not allowed.

115. *Attorney telephone calls* – Inmates shall request permission in writing to communicate by telephone on legal matters. The request shall be addressed to the Warden. The request must explain the need to communicate by phone in lieu of using other means of court access such as personal visits by their attorney, communication by mail or use of the Law Library for research.

    Telephone calls on legal matters shall be restricted to three calls per week. This

includes local and long distance calls. Each telephone call may be limited to five (5) minutes duration. Pro Se inmates shall receive no special dispensation from this provision. They shall be provided the same means of access to the courts that are provided to all inmates.

The costs of the phone calls shall be debited from the inmate's spendable account unless they make the call "collect." Accounts will be debited even if there are insufficient funds in the account to cover the cost of the call at the time it is made.

116. *Ombudsman calls* – Telephone calls to and from the Ombudsman shall be permitted at any reasonable hour without delay.

117. *Hawaii Paroling Authority* – Inmates will not be allowed to call their parole officers unless the parole officer has given prior clearance to the Case Manager.

118. *Internal Affairs Office* – Inmates may contact the Internal Affairs office directly by telephone. The I.A.O. will screen all inmate telephone calls and determine whether the inmate has a legitimate reason to call. Inmates may also correspond with I.A.O.

119. *Other official calls* – Calls to the Police Department, State or Federal agencies, residential treatment programs, child protective services, family support services, family court, etc., require prior approval of the Unit Manager, Sergeant, or Case Manager.

Wonderphone, third party, conference, party line and speaker phone calls are not allowed. Inmates will speak with only one person at a time.

STORE ORDERS

120. Inmates shall be permitted outside store orders as scheduled, Orders will be limited to an amount approved by the Warden. Athletic shoes will be purchased separately through a request to the inmate store manager.

121. Inside store orders shall be permitted once a month as scheduled. Orders will be limited to an amount approved by the Warden.

122. All personal items not issued will be bought through store order only.

EXERCISE PERIOD

123. Inmates shall be allowed to have a 60-minute outdoor exercise period on weekdays as scheduled excluding holidays, unless compelling security or safety reasons dictate otherwise.

124. The recreation yards have out-of-bounds areas marked with red lines. Inmates will remain within authorized areas only.

125. Water fountain in the recreation yard shall not be used for the purpose of washing up, showering, or urination.

126. There will be no climbing on the recreation yard fence or walls and inmates shall not place feet on walls.

127. Inmates shall not write, scratch, etch or deface the doors, windows, walls, floor or any other area in the recreation yard.

128. Inmates shall not talk, yell, shout or converse with any other inmate while at recreation.

SMOKING PRIVILEGES

129. The Maximum Custody Unit will be a non-smoking area. Cigarettes, tobacco and smoking paraphernalia will not be permitted.

130. Inmates will not request for cigarettes from staff. Cigarettes will not be permitted in the law library or the medical, dental or psychiatric offices.

INCOMING/OUTGOING PERSONAL ITEMS

131. Inmate transactions regarding court clothes and funeral attire will be done during the weekdays, except holidays, between 0800 hours and 1530 hours with prior approval.

132. Requests for these kinds of transactions require at least three (3) working days prior written notice and approval. Inmates shall submit inmate request form to their respective case manager stating items to be picked up or dropped off and by whom.

133. No books or magazines may be brought in via family and friends.

GROOMING STANDARDS

134. Grooming standards include washing, brushing teeth, combing hair, and attending to personal needs.

135. Inmates are encouraged to shower and shave regularly. Inmates will be given the opportunity to shower at least five (5) times per week for a time not to exceed ten (10) minutes unless compelling security or safety reasons dictate otherwise. No toothbrush or comb will be brought out of the inmate's cell.

136. Inmates are scheduled for haircuts at least once a month when equipment is made available.

137. Razors will be provided to inmates for use in their cell for a time not to exceed five minutes, five times per week. Disposable razors shall be provided weekly by staff for each inmate's individualized use.

138. Hair styles shall be in accordance with traditional standards of taste and the hair maintained in a neat and presentable fashion at all times.

139. Extreme hair styles such as modern styles or colors, unkept hair, and exaggerated sideburns are unacceptable. Hair that is excessively long in the front, side, or back of the head is not considered appropriate. Hair length shall not touch the shoulders.

Braids and/or cornrows are not authorized.

140. Inmates shall not be allowed to have a "shaved head" haircut unless approved by the Warden or his designee.

141. Beards and mustaches may be allowed if they are short, trimmed, clean, and groomed. Cleanliness, sanitation, security, and safety of the inmates will be taken into consideration. Beards will not be more than 1/2 inch from the face or longer than one (1) inch from the chin.

142. Sideburns shall not extend below the tip of the ear lobe and shall be trimmed level. The forward and rear edge of the sideburns should be maintained following the natural hairline. Extreme styles such as "mutton chops" are not permitted.

143. Tattooing is prohibited.

144. Fingernails shall be maintained at a length that will not present a hazard to security and health.

MONEY

145.. Monetary donations will only be accepted for inmates from persons on the approved inmate visitation list. The inmate will incur all postage costs to have the money order, check, etc., returned to the sending party if the incoming monetary donation is deemed unauthorized.

146. There shall be no checks drawn on any inmate account for any reason other than the following:

Reimbursement of personal collect telephone calls up to $25.00. All checks will be made out directly to Hawaiian Telephone upon receipt of appropriate verifications.

Court ordered payments: i.e., restitution, fines, etc.

Magazine subscriptions with prior approval from he [sic] Unit Team.

147. Incoming money may be accepted through the mail in the form of money orders or cashier's checks only. Incoming money (money orders, cashier's checks and cash) may be brought to the facility on Mondays through Fridays, excluding holidays, between 0800 hours and 1600 hours. Personal checks will not be accepted at any time.

148. All checks and money orders, shall be made out to the "HALAWA CORRECTIONAL FACILITY" and indicate the inmate's commitment name.

105s

149. An accumulation of five (5) various negative 105s or write-ups within a six (6) month period may result in the inmate facing the program Committee for possible revocation of privileges.

150. When an inmate incurs two similar types of negative 105s within a six-month

period, then that inmate may be subject to a misconduct and disciplinary actions [sic].

DRUG DETECTION PROGRAM

151. As indicated in facility policy, drug screen testing may be done for cause or as part of a random screening program conducted at regular or irregular intervals to effectively control the unauthorized use of drugs of all types and the abuse of medicinal substances for other than medical use in efforts to provide a safe and secure atmosphere for the mutual benefit of all personnel and all inmates.

The "Maximum I Custody Unit Guidelines" may be revised, modified or amended without prior notice to the inmates upon approval of the Warden. They become effective upon approval.

Approved:

/s/ Guy Hall
Guy Hall, Warden

06/16/94
(MAX1LINE)